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No. 73-772

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

DALY AND OTHERS,

Petitioners,

vs.

NATURAL RESOURCES BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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NATURAL RESOURCES BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Petitioners, Shirley Daly, et al., pray that a writ of certiorari issue to review the final judgments of the Supreme Court of the State of Wisconsin, entered in this case on June 29, 1973 and August 28, 1973.

OPINIONS BELOW

The unreported findings of facts, conclusions of law and permit for construction of the dam issued by the Wisconsin Department of Natural Resources, appear post, pages 54-67, Appendix D. The unreported opinion of the Trial Court appears post, pages 18-51, Appendix B. The Trial Court's unreported judgment is at page 52, Appendix C. The opinion of the Supreme Court of the State

of Wisconsin entered June 29, 1973, and reported at 60 Wis. 2d 208, 208 N.W. 2d 839 (1973), is reproduced post, pages 1-17, Appendix A. The unreported opinion of the Supreme Court of the State of Wisconsin on petition for rehearing is reproduced post, page 17, Appendix A.

JURISDICTION

The opinions and orders of the Supreme Court of the State of Wisconsin, were filed on June 29, 1973, and August 28, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Did the Wisconsin Supreme Court err in upholding a state agency's approval of an application to dam and flood tribal lands when the conveyance of these lands to the applicant did not meet the requirements of the Menominee Termination Act and Plan? (See companion petition, *Tomow*).

2. Whether the Wisconsin Supreme Court can abrogate Menominee hunting and fishing treaty rights which were affirmed by this Court in *Menominee Tribe* v. *U.S.*, 391 U.S. 404 (1968)?

STATUTES INVOLVED

Menominee Termination Act of 1954, as amended, P.L. 83-399 (68 Stat. 250) June 17, 1954, 25 U.S.C. §§891-902, as made effective by Proclamation of the Secretary of the Interior, April 29, 1961, 26 Fed. Reg. 3726. Also Wis. Stat. §31.05, Applications for permits to construct, and Wis. Stat. §31.06, Hearing, are reproduced in Appendix E, post.

STATEMENT OF THE CASE

Introduction

The background facts and many of the transactions involved in this case are identical with Henry L. Tomow, Sr., et al., petitioners v. Menominee Enterprises, Inc., et al., respondents and N. E. Isaacson & Associates, Inc., respondent (*"Tomow"*), which is the subject of the petition for a Writ of Certiorari to the Supreme Court of the State of Wisconsin which was filed simultaneously with this case. Insofar as this case involves federal claims identical to those raised in *Tomow* concerning sales of Menominee Indian tribal lands to non-Menominees, the statement of facts in *Tomow* respecting the *historical background* and *the process of termination* is hereby adopted in toto.

Lakes of the Menominees Development[1]

On August 10, 1967, the Menominee Enterprises, Inc. (MEI) Board of Directors, who are elected under the terms of the Menominee Termination Plan by the voting trustees, and the voting trustees jointly passed a resolution authorizing MEI to:

> define economic development zones on its land in Menominee County, Wisconsin, not to exceed 8,750 acres in areas to be defined and described from time to time by the Menominee Common Stock and Voting Trust, and/or the shareholders of the Corporation, whichever then holds the common stock; and . . . that pursuant to Article XII of the Articles of Incorporation of Menominee Enterprises, Inc. within such economic development zones warranty deeds may issue as a form of land transfer. . . .

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[1] The following facts are derived from the Wisconsin Supreme Court opinion, Appendix A, pp. 1-17, post, and the circuit court opinion, Appendix B, pp. 18-51, post and the citations given.

Pursuant to this resolution, on July 9, 1968, MEI and N. E. Isaacson & Associates, Inc., a land developer and artificial lake builder, entered into an agreement whereby they established a joint venture to be known as "Lakes of the Menominees" (LOM) for the "purpose of holding, developing and selling to persons including non-Menominees certain lands consisting of 5,170 acres located within the economic development zone. . . ." See companion petition in *Tomow*. The lands within the economic development zone consisted of rich marsh and swamplands, which were particularly suited for tribal hunting and fishing needs. In fact the game and fish of these and similar swamplands provided the inducement for tribal acceptance of the reservation granted in the 1854 Treaty of the Wolf River. See *Menominee Tribe of Indians* v. *United States*, 95 Ct Cl 232, 240-241 (1941).[2] This agreement was given unanimous approval by the voting trustees.

LOM undertook a substantial and extensive land and lake development project known as "Legend Lake." The project called for the creation of three large, artificial lakes to be formed by a system of dams from small, natural lakes and marsh lands, long used by the tribe for hunting and fishing. See 95 Ct. Cl. 232, supra. To complete the project LOM filed an application under Chapter 31 of the Wisconsin Statutes with the Wisconsin Natural Resources Board (Department of Natural Resources or DNR) for a permit to construct, operate and maintain

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[2] These swamplands include those located within Section 23, Township 28N, Range 16E. 95 Ct. Cl. 232, 237. See also Appendix D, p. 60, post, Findings of Fact by the Department of Natural Resources, noting that these lands are included in the present controversy.

a dam in the Linzy Creek outlet of Pywaosit Lake in Menominee County. See Appendix D, p. 54, 59 post. Chapter 31, see Appendix E, post, provides, inter alia:

> 31.05 (1969) Any person, firm, corporation . . . desiring a permit to construct, operate and maintain a dam shall file with the department a written application therefor . . .

The application must include:

> 31.05(3) proof satisfactory to the department that the applicant owns or has an enforceable option to purchase the described dam site and at least 65% of the land to be flowed, or the flowage rights on at least 65% of such land.

Section 31.06, requiring the DNR to hold a hearing concerning the application, also states:

> 31.06(2) . . . the applicant . . . shall mail to every person interested in any lands that will be affected by the proposed dam and whose post-office address can by due diligence be ascertained, notice of the time and place set for such hearing . . .

The applicant had a notice published in the appropriate newspaper. Hearings were held on July 7, 1969, in Madison, and on February 3, 4 and 5, 1970, in Green Bay. Several persons appeared, were heard and recorded as being in favor of the application. Petitioners appeared and opposed the application, arguing that the tribe owned the property involved; that the tribal members had not authorized the project; that they had been deceived; that the Voting Trust had no authority to sell their land; and that their hunting and fishing, as well as other treaty rights, including the ecological preservation of the area, were impaired by the sale and the project. The Depart-

ment of Natural Resources issued findings of facts and conclusions of law. See Appendix D, pp. 54-67 post. Quoting the language of LOM's application, the DNR specifically found, inter alia,

> Par. 5—Menominee Enterprises, Inc., is the owner of the dam site and flowage area. They will deed the property to Lakes of the Menominees.

On September 14, 1970, the permit to construct the dam was issued. See Appendix D, pp. 64-67 post.

History of Litigation

On October 14, 1970, Shirley A. Daly, an enrolled Menominee, seven other enrolled Menominee Indians, and the wife of an enrolled Menominee, filed a petition in the Circuit Court of Dane County, Wisconsin, requesting the court to review and vacate the Department of Natural Resources' order granting the permit to LOM to construct the dam. See Appendix B, p. 19 post. Among other things, petitioners contended that the DNR's finding that LOM was the owner of or had an enforceable option to purchase the dam site and flowage area was contrary to Wisconsin statutes, violated petitioners' federal, constitutional, and treaty rights, and was unsupported by substantial evidence in view of the entire record as submitted.

The petitioners argued that under the Termination Plan, which the Secretary approved, only the tribal members as MEI shareholders could authorize sales of tribal property outside the tribe. Since the record was barren of any evidence showing such tribal approval, the finding was without support. Furthermore, the Termination Act did not amount to Congressional abrogation of Menomi-

nee hunting and fishing treaty rights incorporated in the provision "to be held as Indian lands are held," as found by this court in *Menominee Tribe of Indians* v. *United States,* 391 U.S. 404 (1968). Since these treaty rights continued, petitioners further argued that the transfer of tribal lands were subject to restrictions not normally found on other lands. The lands, granted to the tribe by treaty with the United States, constitute valuable property rights which cannot be taken from the tribe unless they relinquish those rights as set forth in the Termination Act and MEI's Articles of Incorporation. Since the record revealed no evidence showing that they have relinquished those rights, petitioners argued that the Court could not allow DNR's order to thwart Congressional intention to protect their rights. The court rejected petitioners' pleas holding, inter alia, that the statement concerning ownership in LOM's application was sufficient for DNR's finding under §31.05(3), Wis. Statutes. The Circuit Court actually sidestepped the issue by stating MEI's "ability to convey may be and should be raised properly in another forum. If it be there determined that Menominee Enterprises, Inc., . . . has no right to convey . . . that will be the end of [the project]. . ." See Appendix B, p. 30 post, and the *Tomow* petition where this issue is discussed in detail. Regarding treaty rights, the court was "satisfied that the Treaty of Wolf River did not freeze for all time the topography or ecology of the lands and water now embraced within Menominee County." See Appendix B, pp. 31-32 post. The court further found that the hearing was not a "contested" [quasi-judicial] one, therefore, certain due process requirements, such as "reasonable notice" were inapplicable. Nevertheless, the court held that notice was given to all interested parties. See Appendix B, pp. 22-23 post.

On appeal to the Wisconsin Supreme Court, petitioners raised questions of state administrative law as well as questions of federal law. The petitioners sought to establish (1) that the transfer from MEI to LOM of the dam site and flowage area was illegal in that it violated relevant portions of the Menominee Termination Plan, and (2) that the action of DNR in authorizing and granting the permit to create the dam project would result in the flooding of Indian lands valuable for breeding fish and game and therefore would cut them off forever from enjoying their federal treaty rights to hunt and fish on these lands. See Appendix A, pp. 1-17 post. Petitioners further asserted that because all enrolled Menominee held treaty and property interests in the lands affected, failure to notify them by mail of the DNR hearing violated their statutory due process rights.

The Wisconsin Supreme Court in addressing the ownership and notice arguments relied totally on its holding in *Tomow* v. *MEI,* 60 Wis 2d 1 (1973), 208 N.W. 2d 824. See companion petition in *Tomow.* Thus, because title to the land and the right to manage and sell it was in MEI and the Voting Trust, the court rejected petitioners' arguments. See Appendix A, p. 11 post. That court further held that the hearing was "contested" [quasi-judicial] because the appellant Menominees (1) had a legal right as Wisconsin citizens to protect their public right to enjoy navigable waters for recreational purposes, including enjoyment of scenic beauty and (2) an "additional indirect right in the preservation of their hunting and fishing privileges." See Appendix A, p. 10 post. Nevertheless, the court found no due process violations, as it refused to further consider the federal treaty infringement arguments made by petitioners. See Appendix A, p. 10 post. The DNR's order granting the application to construct the dam was affirmed. From the decision of the Wisconsin Supreme Court the petitioners seek certiorari.

REASONS WHY THE WRIT SHOULD BE GRANTED

A. THE WISCONSIN SUPREME COURT RELIED EXCLUSIVELY ON ITS ERRONEOUS DECISION IN TOMOW v. MEI IN DETERMINING THE VALIDITY OF TRIBAL LAND SALES BY MEI TO THE LOM JOINT VENTURE, AND, HENCE, ITS DETERMINATION AS TO OWNERSHIP OF THE LANDS TO BE FLOODED IS ALSO ERRONEOUS.

The Wisconsin Supreme Court's affirmation of the Department of Natural Resources finding that LOM owned or had an enforceable option to purchase the dam site and flowage areas is based entirely on that Court's erroneous decision in *Tomow* v. *MEI*. See the companion *Tomow* petition for certiorari. The *Tomow* decision as applied here by the Wisconsin Supreme Court ratifies the conveyance by seven people, three of whom were non-Menominees, of tribal lands to a joint venture consisting of MEI and N. E. Isaacson, a non-Menominee developer, to be re-sold to non-Menominees. It also ratifies the decision of the State's Department of Natural Resources to grant the LOM joint-venturers a dam construction permit after a hearing without notification to members of the Menominee Tribe. In addition, it permits that developer to destroy natural lakes and marshlands which will irreparably injure tribal hunting and fishing rights which were granted to the Menominee Tribe in the Wolf River Treaty of 1854 and affirmed by the Court of Claims in *Menominee Tribe* v. *U.S.*, 95 Ct Cl 232 (1941) and this Court in *Menominee Tribe* v. *U.S.*, 391 U.S. 404 (1968).

Certiorari should be granted because the *Tomow* decision is erroneous, and because its application here violates: (a) the Termination Plan, including MEI's Articles of Incorporation, a federal document entered pursuant to Congressional mandate and approved by the Secretary of the Interior, (b) petitioners' rights to due process of law, and (c) petitioners' treaty rights.

The Wisconsin Supreme Court's failure to apply Indian law principles in its construction of the Termination Act and Plan has been raised and fully argued in the related petition for certiorari in *Tomow*. Since the transactions as well as the issues of Indian law involved in *Tomow* are identical with the objections of petitioners in this case respecting the sale of lands by MEI to LOM, and hence, the DNR's finding as to ownership of the land to be flooded by the dam, petitioners refer the Court to the companion *Tomow* petition with respect to this federal issue.

B. BY UPHOLDING THE PERMIT GRANTED BY THE DNR TO LOM, THE WISCONSIN SUPREME COURT HAS ABROGATED MENOMINEE HUNTING AND FISHING TREATY RIGHTS WHICH THIS COURT HELD SURVIVED TERMINATION IN MENOMINEE TRIBE v. U.S., 391 U.S. 404 (1968).

1. By acknowledging petitioners treaty claims but then upholding the grant of the dam permit, the Wisconsin Supreme Court has ignored the express ruling of this Court in Menominee Tribe of Indians v. United States, 391 U.S. 404 (1968).

In 1968 this Court granted a Writ of Certiorari to determine whether certain hunting and fishing treaty rights reserved to the Menominee tribe by the Treaty of Wolf

River in 1854 were abrogated by an Act of Congress, the Menominee Termination Act, 25 U.S.C. §891 et seq. This Court resolved the conflict between the state court, the Wisconsin Supreme Court, which had ruled that the Indian rights no longer survived, and the federal court, the United States Court of Claims, which had ruled that since the Menominee Termination Act did not include specific Congressional language abrogating the Menominee treaty rights to hunt and fish, the rights survived. This Court affirmed the ruling of the United States Court of Claims. See *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404 (1968). Now, five years later, petitioners once again request this Court to reverse a determination by the Wisconsin Supreme Court which impairs and infringes Menominee hunting and fishing treaty rights.

The Wisconsin Supreme Court's decision permits Menominee treaty rights to hunt and fish to be modified and abrogated by non-Menominees with the consent and approval of the State of Wisconsin but without the consent and approval of the Menominee People or Congress. The dam permit authorized LOM to flood valuable Indian swamplands which the tribe had specifically chosen for its rich variety of hunting and fishing. See *Menominee Tribe of Indians* v. *United States*, 95 Ct Cl 232, 240-241 (1941). The flooding irreparably altered the area's swampy ecology, which fostered the breeding and spawning of game and fish. Further, tribal lands sold to non-Menominees were, in effect, removed from the Menominee hunting and fishing domain. This state action infringing the acknowledged federal treaty rights of Menominee tribal members is a direct assault on this Court's ruling in *Menominee Tribe of Indians* v. *United States*,

supra, for in that case this Court ruled that petitioners' treaty hunting and fishing rights survived Termination, since only Congress can abrogate or modify a treaty right, and that Congress had not abrogated any such rights in terminating the federal supervision of the Menominee tribe.

2. Approval of the construction of the dam to create the artificial Legend Lake by the DNR violated the Supremacy Clause of the United States Constitution.

The Constitution makes the treaties of the United States the supreme law of the land and specifies that they are binding as to the states. Article VI of the United States Constitution says in pertinent part:

> [That] all Treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

Treaties with Indian tribes are of the same dignity as treaties with foreign nations, the Supremacy Clause being equally applicable to both. *U.S.* v. *43 Gallons of Whiskey,* 93 U.S. (3 Otto) 188 (1876); *Worcester* v. *Georgia,* 31 U.S. (6 Pet) 515 (1832); F. Cohen, Handbook of Federal Indian Law, 33-34. Any state law, regulation or practice which is inconsistent with the treaties involved is necessarily ineffective as violative of the Constitution. The language and the intent of the treaties must prevail. *See,* e.g., *Menominee Tribe of Indians* v. *United States, supra; Puyallup Tribe* v. *Department of Game,* 391 U.S. 392 (1968), *reh den* 393 U.S. 898 (1968); *Tulee* v. *Wash-*

ington, 315 U.S. 681 (1942); *Worcester* v. *Georgia, supra.* This Court cannot allow the Wisconsin Supreme Court and a state agency to impair Menominee treaty rights in violation of the Supremacy Clause.

3. The acts of the DNR in granting a permit to construct the dam to create the artificial Legend Lake upon the contested Indian lands violates Public Law 280, a Congressional statute which provides explicit protections for Indian hunting and fishing rights.

It is a cardinal principle of Indian law that Congressional power in the area of Indian affairs is plenary. *Worcester* v. *Georgia,* 31 U.S. (6 Pet) 515 (1832); *McClanahan* v. *State Tax Commission,* 411 U.S. 164 (1973). State law may not infringe upon an activity protected by federal law. *See, e.g. U.S.* v. *Kagama,* 118 U.S. 375 (1885); *Rice* v. *Olson,* 324 U.S. 786, 789 (1949); *Warren Trading Post* v. *Arizona Tax Commission,* 380 U.S. 685 (1965). Congress has exhibited a conservative attitude toward the extension of state power over Indian affairs. *Kennerly* v. *District Court of Montana,* 400 U.S. 423 (1971).

Protection of rights secured to Indians under federal treaties is an area in which there is a substantial federal interest. To be sure, Congress has dealt jealously with the question of allowing states to extend their jurisdiction over treaty-secured Indian hunting and fishing rights. Thus, the general statute, Public Law 280, 18 U.S.C. §1162, 28 U.S.C. §1360, 67 Stat. 588, as amended, which provides for the assumption of Wisconsin State civil and criminal jurisdiction over Indians, specifically protects their hunting and fishing rights:

> Nothing in this section . . . shall deprive any Indian or any Indian tribe, band or community of any right, privilege or immunity afforded under federal treaty, agreement or statute with respect to hunting, trapping, or fishing or the control, licensing or regulation thereof.

As this Court indicated in *Menominee Tribe of Indians* v. *United States, supra:*

> That provision on its face contains no limitation; it protects any hunting, trapping, or fishing right granted by a federal treaty. 391 U.S. at 411.

This Court considered Public Law 280 *in pari materia* with the Termination Act when it concluded that "the hunting and fishing rights granted or preserved by the Wolf River Treaty of 1854 survived the Termination Act." 391 U.S. at 411.

The Circuit Court in the instant case attempted to avoid the federal mandate of Public Law 280. By holding "that the Treaty of the Wolf River did not freeze for all time the topography or ecology of [the lands here in issue]," the court permitted the DNR to authorize the permanent alteration of the ecology by flooding the rich swamplands the tribe had specifically chosen for its good hunting and fishing opportunities. The issue is not, however, whether or not the topography or ecology of the lands is frozen for all times, but whether or not the use of the land may, in effect, abrogate hunting and fishing rights secured by treaty. Here, the flooding of the lands by LOM destroys the fish spawning areas as well as the Menominee rights to hunt on those lands in violation of Public Law 280. The Wisconsin Supreme Court ignored completely the existence of Public Law 280.

4. The acts of the DNR in granting a permit to construct the dam to create the artificial Legend Lake on contested Indian lands violates Menominee hunting and fishing rights protected by the decisions of this Court.

On numerous occasions this Court has had an opportunity to protect the exercise of Indian treaty rights of hunting and fishing from infringement by both state and private parties. The issue has often centered not upon whether or not the Indians owned the land but whether or not the treaty right existed thereon. In *Menominee Tribe of Indians* v. *United States, supra,* this Court determined that treaty hunting and fishing rights continued to exist on the lands here involved after Termination. Regardless of ownership, neither private individuals nor state governments can prevent Indian access to these lands for the purpose of exercising their hunting and fishing rights because such lands are restricted by servitudes and easements for the benefit of the Indians. See *United States* v. *Winans,* 198 U.S. 371 (1905); *Seufert Brothers Co.* v. *United States,* 249 U.S. 194 (1918); *State* v. *McClure,* 127 Mont. 534, 268 P 2d 629 (1954). Compare also *Mattz* v. *Arnett,* ..... U.S. ....., 37 L Ed 2d 92 (1973). The flooding of the lands here involved, however, by LOM under authorization from the State of Wisconsin, amounts to the very type of prevention of access prohibited by the decisions of the above cited cases.

These cases provide ample precedent to demonstrate the great lengths which this Court has taken to assure that once treaty rights have been reserved for Indian people, they shall not be abridged or modified by subsequent actions of private individuals or state officials.

C. THE PROCESS BY WHICH THE DNR AFFORDED THE PARTIES AN OPPORTUNITY TO BE HEARD FAILED TO PROVIDE ENROLLED MENOMINEE INDIANS WITH NOTICE OF THE HEARING IN VIOLATION OF WISCONSIN STATE LAW AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

The Wisconsin Supreme Court held that notice of the DNR hearing was required but that each enrolled Menominee need not have been personally notified. However, Wis. Stat. 31.06(2) requires that every person with an interest in the lands to be affected by the dam must be provided personal notice of the DNR hearing. Furthermore, the hearing itself was quasi-judicial in nature thereby requiring notice be given to interested parties. (The Wisconsin Supreme Court held that the hearing was "contested," the Wisconsin statutory definition of quasi-judicial. See Appendix A, p. 10 post. *See also* Wis. Stat. §§227.01(2), 227.07.) See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Groppi* v. *Leslie*, 404 U.S. 496, 502-503 (1972). The Due Process Clause of the 14th Amendment at a minimum requires that deprivation of property by an adjudicatory process be preceded by notice reasonably calculated to apprise interested parties of the pendency of the action in order to afford them an opportunity to be heard. The Wisconsin Supreme Court recognized that enrolled Menominees had hunting and fishing rights but that because the Voting Trust had the power to sell the land, individual Menominee did not have sufficient personal interest so as to entitle them to personal notice. See Appendix A, p. 10 post.

Regardless of the Voting Trust's power to authorize land sales to non-Menominees, this Court determined in 1968 that the tribe, which continued to exist following termination, *Menominee Tribe* v. *United States*, 179 Ct Cl 496, 500 (1967), retained hunting and fishing treaty rights. 391 U.S. 404. These treaty rights, fundamental to Menominee life style, conferred on enrolled Menominee tribal members property interests in the former reservation lands which include the natural lakes, swamplands and surrounding forests that are the subject of this law suit. Thus, each enrolled Menominee had a property interest in the lands affected by the Legend Lake project. Each was therefore entitled to personal notice as provided by Wisconsin statute and Constitutional due process requirements for quasi-judicial hearings and proceedings. Failure to provide each enrolled Menominee with personal notice of the hearing concerning the permit to construct the dam grossly deprived the Menominees of an opportunity to be heard and defend their tribal property right to hunt and to fish these rich lands. The effect of the Wisconsin Supreme Court's approval of this procedure constitutes a backhanded way of abrogating the Menominee hunting and fishing rights.

Furthermore, the members of the Menominee Tribe, not the Voting Trust, retained the power to authorize land sales to non-Menominees. See companion *Tomow* petition. As a result each enrolled Menominee held a special interest in the lands affected which was guaranteed by the Menominee Termination Act and Plan, thereby entitling each individual to a statutory and constitutional right to notice of the administrative hearing. The Wisconsin Supreme Court's reliance on the fact that the petitioners appeared in opposition, does not cure the failure of notice to all the tribal members, who might then have marshalled enough support to prevent the dam permit from being issued.

D. THE WISCONSIN SUPREME COURT'S DECISION, IF ALLOWED TO STAND BY THIS COURT, WILL CONSTITUTE A LEGAL PRECEDENT HARMFUL TO NOT ONLY THE MENOMINEE BUT TO ALL AMERICAN INDIANS.

American Indians have continuously conducted an oftentimes losing battle to retain ownership of their tribal lands and to protect their hunting and fishing treaty rights which are integrally connected with the preservation of the natural ecology of their lands. The Wisconsin Supreme Court's decision seriously threatens the Menominee Tribe's and all American Indians' chances for successfully retaining that which is theirs.

The effects of the Wisconsin Supreme Court's decision regarding Indian land sales to non-Menominees and construction of federal Indian documents are identical to those discussed in the related *Tomow* petition and are not here repeated.

Only Congress may abrogate Indian treaty rights. The Wisconsin Supreme Court has, however, in this case, abrogated Menominee treaty hunting and fishing rights on the lands affected by the flooding. The Wisconsin court's decision encourages state governments to surreptitiously abrogate Indian hunting and fishing rights. That court's acknowledgement of petitioners' treaty rights and subsequent ignoring of them in affirming the grant of the permit, constitutes a blatant disregard for federal treaties with Indian tribes, decisions of this Court, and basic due process principles of fair notice and hearing. Indians should not be dependent on newspaper notice in order to defend treaty rights before state agencies.

Furthermore, state agencies will be able to cite the Wisconsin decision for support whenever they wish to alter the topography and ecology of Indian lands without providing notice and an opportunity for the Indian owners to be heard on the effects such actions might have on hunting and fishing treaty rights. Thus, American Indians would no longer be able to rely on their treaties with the federal government, nor for that matter on constitutional due process rights, nor on the decisions of this Court, to protect their interests, because states will be able to abrogate indirectly, by procedures altering topography and ecology, treaty rights which they cannot abrogate directly.

Regarding state actions effecting the topography and ecology of Indian lands, it is important to note that the topography and ecology are not only important to the preservation of Indian hunting and treaty rights but are also crucial to the Indian view of land. To the Menominees and most American Indians, the earth is deemed to be the Mother from which all living things emerge. Its ecological preservation is nothing less than a religious obligation. The laws of the United States and the several states should help, not hinder, threatened cultures.

CONCLUSION

The petition should be granted for the above reasons and those stated in the companion petition in the case entitled *Tomaw* v. *MEI et al and N. E. Isaacson.*

Respectfully submitted,

Joseph F. Preloznik
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APPENDIX A

SUPREME COURT OF WISCONSIN

DALY and others, Appellants, v. NATURAL RESOURCES BOARD, Respondent. [Case No. 218.]*

McCONNELL, Public Intervenor, Appellant, v. NATURAL RESOURCES BOARD, Respondent. [Case No. 219.]*

Nos. 218, 219. Argued June 4, 1973.—Decided June 29, 1973.

APPEAL from a judgment of the circuit court for Dane county: LEWIS J. CHARLES, Circuit Judge of the Fifteenth Circuit, Presiding. *Affirmed.*

This action in circuit court was to review an order of the Department of Natural Resources (hereinafter the DNR) granting a permit to build a dam across Linzy Creek in Menominee county. The circuit court vacated and set aside a part of the order affecting other dams in Menominee county but affirmed the order granting the permit for the dam in question. The appeal is only from that part of the judgment affirming the order authorizing the permitting of the construction of the dam described in the application for the permit.

As is apparent from the caption, two actions were commenced in circuit court to review the order of the DNR; however, they were consolidated for trial and the judgment appealed from encompassed the issues of both

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* Motions for rehearing pending.

cases. The petitioner, Robert B. McConnell, public intervenor in the second case, has not appeared in these appellate proceedings.

On March 11, 1969, Lakes of the Menominees (LOM), a co-partnership or joint venture, filed an application under ch. 31, Stats., to construct a dam at the Linzy Creek outlet of Pywaosit Lake in Menominee county. The partners of LOM are Menominee Enterprises, Inc. (MEI) and N. E. Isaacson & Associates, Inc. (Isaacson).

A hearing was scheduled and held in Madison on July 7, 1969. Objections were made at this hearing and it was adjourned until February 3, 1970, at Green Bay. The Green Bay hearing was conducted by Maurice H. Van Susteren and Edward Main, acting as hearing examiners for the DNR. The hearing took three days. Several persons appeared, were heard and recorded as being in favor of the application, and a great number appeared or were represented and recorded in opposition. Those in opposition, who so desired, were heard.

On September 14, 1970, the permit to construct the dam was issued and thereafter these actions to review the order were commenced in circuit court.

The appellant-petitioners, Shirley Daly and six other named persons, are enrolled members of the Menominee Tribe of American Indians and claim an interest in lands which will be affected by the construction of the dam. In the circuit court Mr. McConnell appeared as a public intervenor.

The petitioners-appellants, Shirley A. Daly et al., appeal.

The facts will be set forth in the opinion.

For the appellants there was a brief by ***Joseph F. Preloznik*** and ***Mary V. G. Thoenig,*** Wisconsin Judicare, of Madison, and oral argument by ***Mr. Preloznik.***

For the respondents there was a brief by ***W. Scott Van Alstyne, Jr.,*** of Madison, special counsel for the department of natural resources and natural resources board, and *Charles J. Herro* of Oconomowoc, of counsel, for N. E. Isaacson & Associates, Inc., and Menominee Enterprises, Inc., d/b/a Lakes of the Menominees, and oral argument by ***Mr. Van Alstyne.***

Beilfuss, J. The appellants contend (1) that the proceeding before the DNR was a contested case and not a legislative hearing, (2) that due process "fair-play" requirements of ch. 227, Stats., for a contested case were not complied with, (3) that the notice requirements of sec. 31.06 (2) were not complied with, and (4) that findings of fact of the DNR were not supported by "substantial evidence in view of the record as a whole."

A brief résume' of some historical facts of Menominee county may be helpful in discussing the position of the parties and the issues before the court.[1]

In 1854, the United States government, by the "Treaty of Wolf River" gave the Menominees the land of the present Menominee county and afforded them a protective Indian reservation status with federal supervision. In 1954, Congress passed the "Termination Act," which became effective April 30, 1961. The act provided for the end of supervision and control over the Menominees and

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[1] A much more detailed description of the historical events and some of the parties appears in *Tomow* v. *N. E. Isaacson & Associates,* ante, p. 1, — N. W. 2d —.

their reservation, subject to a termination plan to be approved by the Secretary of Interior. Such a plan was approved. The reservation became Menominee county. There were 3,270 enrolled members of the tribe who have a beneficial interest in the property, both real and personal, of Menominee county. The plan also called for the creation of a corporation known as Menominee Enterprises, Inc. (MEI). MEI was to manage and operate all the real and personal property transferred to it by the United States government. About a quarter of a million acres (now Menominee county) were transferred by deed from the United States to the corporation. MEI then transferred all its stock in one certificate to a voting trust. MEI is one of the co-partners of LOM, the applicants for the permit. MEI determined that it and Menominee county could not function on an adequate economic basis without additional revenue. It decided that it was necessary to devote a part of the land to expanded public recreational purposes to generate the needed income. Pursuant to a survey and a recommended plan, some 8,000 acres were set aside for an economic development zone. Of this 8,000 acres, about 5,000 acres at $150 per acre were conveyed to LOM for recreational development purposes to be subdivided and some of the land sold to Indians and non-Indians alike. The voting trust authorized the sale and executed the deeds to LOM, who in turn have sold a considerable part in small parcels to a multitude of purchasers.[2] In *Tomow, supra,* this court upheld the power to voting trust to convey the land and the validity of the deeds to LOM after a legal challenge by some of the enrolled Menominees.

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[2] All of these facts do not appear in the record in this case but we take judicial notice of them from the record and opinion in *Tomow, supra,* for the purpose of clarification.

A part of the development plan called for the creation of three larger lakes to encompass several smaller ones to provide for a more usable and salable shoreline (among other purposes). Two of the lakes, Legend lake No. 1 and Legend lake No. 2 are in existence under valid permits and their legality is not challenged here. To complete the project the DNR has granted a permit, now at issue here, to construct the dam to create Legend lake No. 3 upon the application of LOM.

The controlling statutes (1969) for a permit to build the dam contemplated in the application are as follows:

> "31.05 *Applications for permits to construct.* Any person, firm, corporation or municipality desiring a permit to construct, operate and maintain a dam shall file with the department a written application therefor, setting forth:
>
> ". . .
>
> "(2) The purpose or purposes for which the proposed dam is to be constructed, operated and maintained.
>
> "(3) In case the application is for a permit to construct, operate and maintain a dam for a private purpose, proof satisfactory to the department that the applicant owns or has an enforceable option to purchase the described dam site and at least 65% of the land to be flowed, or the flowage rights on at least 65% of such land. This subsection shall not apply to a person who has the power of eminent domain."
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> "31.06 *Hearing.* (1) Upon receipt of an application for a permit the department shall fix a time, not more than 8 weeks thereafter, and a convenient place, for a public hearing thereon. It shall give notice of such time and place to the applicant who shall cause the same to be published in each county in which riparian lands will be affected by the proposed dam as a class 3 notice, under ch. 985. The department shall also

give notice of such time and place to the county clerk of the county in which the proposed dam and flowage created thereby are located.

"(2) In addition to such publication the applicant, not less than 20 days prior to such hearing, shall mail to every person interested in any lands that will be affected by the proposed dam and whose post-office address can by due diligence be ascertained, notice of the time and place set for such hearing. This notice shall be accompanied by a general statement of the nature of the application and shall be forwarded to such persons by registered mail in a sealed and post-paid envelope properly addressed. Proof of such publication and notice shall be filed with the department.

"(3) At such hearing or any adjournment thereof the department shall consider the application, and shall take evidence offered by the applicant and other persons in support thereof or in opposition thereto, may require the amendment of the application, and if it appears that the construction, operation or maintenance of the proposed dam is in the public interest, considering esthetic, economic and recreational values, the department shall so find and grant a permit to the applicant, provided the department also finds that the applicant has complied with s. 31.14 (2) or (3) and, where applicable, with s. 31.05 (3), based on the department's own estimate of the area of the flowage. The enjoyment of natural scenic beauty is declared to be a public right to be considered along with other public rights and the economic need of electric power for the full development of agricultural and industrial activity and other useful purposes in the area to be served. . . ."

"31.14 *Proof of ability to maintain dams required.*

. . .

"(2) Except as provided in sub. (3), a permit shall not be granted under s. 31.06, 31.08 or 31.13:

"(a) Unless the applicant furnishes to the department proof of ability to operate and maintain the dam in good condition, either by the creation of a special assessment district under ss. 31.38 and 66.60, or by any other means which in the department's judgment will give reasonable assurance that the dam will be maintained for a reasonable period of time not less than 10 years; . . ."

The application was properly filed with the DNR; the DNR fixed the time of hearing, notified the applicant, the county clerk, and the town clerk. The applicant had a notice published in an appropriate newspaper. The hearing was convened in Madison and adjourned to Green Bay. Several persons and groups appeared individually and some by counsel.

The examiner announced at the outset of the proceedings that it was a legislative hearing to determine whether a permit should be granted. He stated "that the rules of evidence so far as relevancy, materiality, competence, matters of credibility of witnesses and so on" were not so important but that a judicial-type format and procedure would be followed. Twenty-eight exhibits were received and twenty-eight persons testified, were cross-examined or made statements. Those opposing the application for the permit challenged the ownership of the land affected (this issue has been resolved by *Tomow, supra*), its effect on other waters and riparian lands, its economic feasibility, its effect upon tribal hunting and fishing rights,[3] and its effect upon esthetic and ecological values.

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[3] *See Menominee Tribe* v. *United States* (1968), 391 U. S. 404, 88 Sup. Ct. 1705, 20 L. Ed. 2d 697.

The appellants contend that this proceeding was a contested case and that the due process, fair-play rules apply, which in turn require notice of hearing and description of the issue, the right to present witnesses and cross-examine. Further, that findings of fact and conclusions of law must be made. And equally important, the standard of review is "substantial evidence in view of the record as a whole."

In contrast, in a legislative-administrative hearing the same rigid notice requirements do not apply, due process procedure is not required and the administrative body can determine whether or not the applicant for a permit has complied with statutory standards from additional evidence or information gathered on its own initiative and outside the record. Further, the standard of review of a legislative hearing is whether the action of the administrative agency or board was "arbitrary and capricious."

The trial court concluded this was a legislative proceeding and not a contested case. The trial court, however, further concluded that even if this was a contested case that due process had been afforded and that the findings of fact were supported by substantial evidence in view of the record as a whole, with exceptions not pertinent here.

A contested case as it applies to an administrative board is defined in sec. 227.01 (2), Stats., as follows:

> "'Contested case' means a proceeding before an agency in which, after hearing required by law, the legal rights, duties or privileges of any party to such proceeding are determined or directly affected by a decision or order in such proceeding and in which the assertion by one party of any such right, duty or privilege is denied or controverted by another party to such proceeding."

From the statute it is clear that three elements must appear before the proceeding becomes a contested case. First, there must be a hearing required by law—sec. 31.06, Stats., requires a hearing. Second, the legal rights, duties or privileges of one party must have been determined or adversely affected by the proceedings—here the right or privilege of LOM to construct the dam was determined. Third, the assertion of those rights, duties or privileges must have been denied or controverted by another party to the proceeding. The right and privilege of the applicant, and even the performance of the duties evolving upon a successful applicant, were denied and controverted. The question remains as to whether those contesting the application were parties to the proceedings within the meaning of the statute.

We believe our opinion in *Muench* v. *Public Service Comm.*[4] (1952), 261 Wis. 492, 53 N. W. 2d 514, 55 N. W. 2d 40, written by Mr. Justice CURRIE, is analogous and compels a determination that this is a contested case. There, Mr. Muench, a private citizen and a member of the Izaak Walton League, appeared before the commission to oppose the construction of a dam across the Namekagon river in Washburn county. The court held that although Muench had no direct financial interest which would be jeopardized by the issuance of a permit to build the dam, he did have a legal right as a citizen to protect his public right to enjoy his navigable streams for recreational purposes—including the enjoyment of scenic beauty —and that he was an aggrieved party and affected by an order granting the permit.

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[4] *See also Margoles* v. *State Board of Medical Examiners* (1970), 47 Wis. 2d 499, 177 N. W. 2d 353.

We conclude the appellants, as citizens of Wisconsin, had the same right to the status of a party as did Mr. Muench in the *Muench Case*. As enrolled members of the Menominee Tribe they had an additional indirect right in the preservation of their hunting and fishing privileges. When the appellants appeared and contested the rights or privileges of LOM to construct the dam they became parties within the meaning of the statute and the proceeding became a contested case.

The appellants contend they were not afforded due process or fair play in the hearing as required in a contested case by ch. 227. We disagree. While due process must be extended in an administrative contested case, this does not mean that all of the procedural niceties of a judicial trial must be observed. The appellants had notice of hearing, they did appear in person and by counsel, they knew the nature of LOM's application, and the statute set forth the standards to be applied. They were permitted reasonable cross-examination and the right to be heard personally and by counsel as to the particulars of their opposition. The DNR did make and file extensive written findings of fact and conclusions of law, together with a specific order. This procedure complies with fair play and due process.

The appellants have raised several specific complaints as to a want of due process. We have examined the record carefully and find none of them to be of such moment individually or collectively so as to amount to want of due process. For this reason we will comment on them only briefly.

There is a contention that the notice provisions of sec. 31.06, Stats., have not been complied with in that personal service of notice or notice by mail was not given

to them or any of the 3,270 enrolled Menominees. In *Tomow, supra,* it was determined that title to land and the right to manage it and sell it was in MEI and the voting trust. The individually enrolled Menominees therefore did not have sufficient personal interest so as to entitle them to personal notice. Notice was published in the newspaper most likely to be seen by the residents of Menominee county. Without question, they did have actual notice—they did appear and did participate.

They complain that their counsel and others not appearing in this appeal were denied full right of cross-examination. Our review of the record convinces us all parties were given reasonable rights of cross-examination.

A claim is made that the examiner was too patronizing to some of those appearing without counsel and opposing the application. A review of the record suggests to us the attempt of the examiner to assist these people was not a fault but a virtue.

A more serious complaint is that the examiner, Van Susteren, for apparent compelling personal reasons, found it necessary to absent himself before the hearing was completed. Instead of adjourning the matter he directed that Mr. Main, an attorney for the DNR who was appearing and participating in the proceeding for the Game and Fisheries Division in opposition to the application, take over as examiner. This practice is difficult to approve—certainly it should not be resorted to except in exceptional circumstances. Here there is no prejudice to the appellants—his interest was consistent with theirs—he appeared to oppose the application.

The appellants further challenge the sufficiency of the evidence to support the findings of fact. Because we have concluded this is a contested case, the standard of review is whether the findings are supported by substantial evidence in view of the record as a whole.

The substantial evidence test is whether reasonable minds could arrive at the same conclusion by the DNR. *Ashwaubenon* v. *State Highway Comm.* (1962), 17 Wis. 2d 120, 115 N. W. 2d 498. The guidelines in applying this test were just recently reiterated in *Reinke* v. *Personnel Board* (1971), 53 Wis. 2d 123, 135, 138, 139, 191 N. W. 2d 833:

> "'. . . The basic case is *Gateway City Transfer Co.* v. *Public Service Comm.* (1948), 253 Wis. 397, 34 N. W. 2d 238. That case pointed out that in reviewing administrative decisions, "substantial evidence" did not include the idea of this court weighing the evidence to determine if a burden of proof was met or whether a view was supported by the preponderance of the evidence. Such tests are not applicable to administrative findings and decisions. We equated substantial evidence with that quantity and quality of evidence which a reasonable man could accept as adequate to support a conclusion. And, in this process, sec. 227.20 (1) (d), Stats., providing that the decision of an agency may be reversed if unsupported by substantial evidence in view of the entire record as submitted does not permit this court to pass on credibility or to reverse an administrative decision because it is against the great weight and clear preponderance of the evidence, if there is substantial evidence to sustain it.
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> "'Substantial evidence is not equated with preponderance of the evidence. There may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the

agency to determine which view of the evidence it wishes to accept. Likewise, there are cases where only one view can be supported by substantial evidence and the determination depends upon the credibility of witnesses.'

". . .

" ' "[T]he term 'substantial evidence' should be construed to confer finality upon an administrative decision on the facts when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, *might* have reached the decision; but, on the other hand, if a reasonable man, acting reasonably, *could not* have reached the decision from the evidence and its inferences then the decision is not supported by substantail evidence and it should be set aside." '

". . .

" 'We deem that the test of reasonableness is implicit in the statutory words "substantial evidence." However, in applying this test the crucial question is whether a reviewing court is only to consider the evidence which tends to support the agency's findings, or whether it is also to consider the evidence which controverts, explains, or impeaches the former. Use of the statutory words "in view of the entire record as submitted" strongly suggests that the test of reasonableness is to be applied to the evidence as a whole, not merely to that part which tends to support the agency's findings.' "

The applicants argue that the DNR's findings of fact 4, 5, 14, 16, 23, 27 and 28 are not supported by substantial evidence.

Finding of fact 4 states:

"The stated purpose of the proposed dam is to create a flowage which will be used for recreation by people who purchase lots in the adjacent subdivisions

being developed by the applicants and thereby increasing the tax base in Menominee County and bringing additional monies into the area."

Appellants maintain that there is not even a scintilla of evidence in the record viewed as a whole that the benefits derived from a broader tax base will be greater than the cost of providing such services to the area. There is ample evidence to support the finding. As respondent correctly points out, Mr. Isaacson, Mr. Kenote and Mr. Harder all testified that the project to build a dam for subdivision purposes will increase the tax base in the county and that the benefits will outweigh the cost of the services. The evidence offered to the contrary as to the increased cost of schools, roads and community services was only general and speculative. The credibility of these witnesses and the weight accorded to their testimony are within the DNR's province and not the courts. *Copland* v. *Department of Taxation* (1962), 16 Wis. 2d 543, 114 N. W. 2d 858, and *Reinke* v. *Personnel Board, supra.*

Finding of fact 5 states:

"Menominee Enterprises, Inc., is the owner of the dam site and flowage area. They will deed the property to Lakes of the Menominees."

This issue has been resolved in *Tomow, supra.*

Finding of fact 14 states:

"The construction of Legend Lake #1 and #2 has caused a reversal of the groundwater table and thereby caused the water levels of Round, LaMotte and Keshena Lakes to rise by seepage due to the head differential of approximately 8 feet."

The testimony on this finding was disputed. It dealt with the question of lake levels and what the water level will be with regard to the construction of the dam. Appellants here only argue the "weight" of the testimony. What weight should be given to conflicting testimony is again in the DNR's province. The DNR found the differential at eight feet, the appellants maintain it is 10 feet. Exhibit 6 gives the different lake levels in the area. Lake LaMotte is 836 feet, Round lake is 839 feet, and Lake Keshena is 837 feet. The rise in the waters at Legend lake is to be fixed at 845.7 feet. The height of Legend lake over Keshena is 8.7 feet, over LaMotte is 9.7 feet, and over Round lake is 6.7 feet. The average differential of these lakes is approximately eight feet.

Finding of fact 16 states:

> "Long Lake located to the north of the third phase will not be disturbed nor connected to this development and will be left as a natural wildlife area."

The dispute here is also based on the credibility of the testimony and its weight to be accorded therein. Some witnesses testified that Long lake will be disturbed while others said it will not. The department found that no such disturbance will occur. As stated in *Reinke,* in such cases it is for the agency to determine which view of the evidence it wishes to accept.

Finding of fact 23 states:

> "The establishment of the trust fund for the operation and maintenance of the dam and flowage by the applicants and with the conditions of the order herein will comply with the provisions of section 31.14 (2), Statutes. This will provide proof to the Department and will give reasonable assurance that the dam will be maintained for a reasonable period of time, not less than ten years."

Appellants' argument that they can find no evidence to support this finding is without merit. Under sec. 31.14 (2), Stats., all that is required is that the applicant furnish satisfactory proof of its ability to operate and maintain the dam in good condition, which in the "department's judgment" will give reasonable assurance that the dam will be maintained for at least 10 years. The DNR has not abused its discretion in exercising that judgment. The town and county of Menominee will accept title to the dam and will help to preserve and maintain the property. Also, a trust fund in the amount of $100,000 was set up to help guarantee this assurance under sec. 31.14 (2). This clearly supports the DNR's judgment that there is reasonable assurance that the mandates of sec. 31.14 (2) will be complied with. The statute does not require proof by evidence beyond all reasonable doubt.

Findings of fact 27 and 28 state:

> "27. The proposed dam will not adversely affect the quality of water and will not pollute Linzy Creek if the applicants meet the conditions of the order herein, and if the planned development is properly controlled by Menominee County.
>
> "28. The cost, operation and maintenance of the proposed dam will be in the public interest, considering aesthetic, economic and recreational values."

Appellants admit in their brief that there is "testimony which if viewed alone would support this finding." But appellants state the finding is unreasonable in light of the entire record. What appellants are really saying is that because the testimony is in conflict on whether the quality of the water will be changed and whether Linzy Creek will be polluted, the DNR's findings are not sup-

ported by substantial evidence. This is a dispute over conflicting testimony and it is within the department's province to weigh it and accept that which it feels is most credible. Some witnesses testified there will be no pollution nor will the quality of the water change. Others felt the contrary. A reasonable man could find support for either position because it was solely a question of whom do you believe. The DNR believed the truth was with the testimony of Mr. Isaacson, Professor Stephenson and Mr. Carlson that there will be no pollution.

We agree with the trial court that there is substantial evidence to support the findings of fact of the DNR challenged in this appeal. The order of the DNR, except as reversed by the trial court, should be approved.

By the Court.—Judgment affirmed.

SUPREME COURT OF WISCONSIN

DALY and others,

Appellants,

Case No. 218 vs.

NATURAL RESOURCES BOARD,

Respondent.

McCONNELL, Public Intervenor,

Appellant,

Case No. 219 vs.

NATURAL RESOURCES BOARD,

Respondent.

Motion for Rehearing decided August 28, 1973.

Motion for rehearing denied, without costs.

APPENDIX B

STATE OF WISCONSIN,
CIRCUIT COURT,
DANE COUNTY

131403

SHIRLEY DALY, et al.,

Petitioners,

-vs-

NATURAL RESOURCES BOARD OF THE STATE OF WISCONSIN,

Respondent.

131405

ROBERT B. McCONNELL, Public Intervenor,

Petitioner,

-vs-

DEPARTMENT OF NATURAL RESOURCES STATE OF WISCONSIN,

Respondent.

MEMORANDUM OPINION
(Decided August 12, 1971)

On September 14, 1970, the Department of Natural Resources, hereinafter called DNR, issued to Lakes of the Menominees, a co-partnership or joint venture, a permit to construct a dam at the Linzy Creek outlet of Pywaosit Lake in Menominee County, Wisconsin. The co-partners or joint venturers are Menominee Enterprises, Inc., and N. E. Isaacson and Associates, Inc. An application for such permit, signed on behalf of Lakes of the Menominees by N. E. Isaacson, was filed with the DNR on or about March 11, 1969.

A hearing on the application was originally scheduled to be held in Madison, Wisconsin, on July 7, 1969. An abbreviated session took place on that day but, due to objections made by certain parties in opposition to the granting of the permit, the hearing was adjourned. It was resumed at Green Bay, Wisconsin, and was conducted over a three day period, February 3rd through February 5, 1970. Prior to the hearing of July 7, 1969, proper notice thereof was given in conformity with Sec. 31.06 (1) and (2), Wis. Stats., by the DNR to the applicant and by the applicant to those persons specified in Sec. 31.06 (2) Wis. Stats.

The DNR, Maurice H. Van Susteren and Edward Main acting as hearing examiners, conducted the hearing at Green Bay. Over the three day period all those for and in opposition to the granting of the permit were given an opportunity to be heard. Document No. 3-WR-543, the permit to construct the dam, set forth as precedent material formal findings of fact and conclusions of law.

Following the granting of the permit a petition for review, under Chapter 227 Wis. Stats., was filed in the Dane County Circuit Court. The petitioners in this action are named as Shirley A. Daly, Constance W. Deer, Constance E. R. Deer, Louise Fowler, Genevieve Hein, Dorothy Leon, Francis Leon, Genevieve Otradovec and Roger Otradovec. The Natural Resources Board is the named defendant. The petitioners, at the hearing of July 3, 4 and 5, 1970 appeared in opposition to the granting of the permit, such appearances being for "C.A.A.M.P. (Citizens' Association for Advancement of Menominee Peoples) and myself," or "on behalf of the Menominee Indians." A petition for review was filed also by Robert B. McConnell, Public Intervenor. In this petition the "Department of Natural Resources, State of Wisconsin" is

the named defendant. In the McConnell petition it is set forth that he is aggrieved by the findings of fact, conclusions of law and order which "adversely and directly affect the legal rights of the public in water and other natural resources . . ."

Prior to the filing of briefs and making of oral arguments the parties stipulated that the two petitions for review be consolidated, the variance in named defendants notwithstanding. It was also agreed that two letters written to this court, one dated March 27, 1971 from Mr. Joseph Preloznik, representing Shirley Daly, et al., and the other dated March 29, 1971, from Mr. Robert B. McConnell, correctly state all of the issues which this court is now called upon to determine. We shall, therefore, ignore any issues posed by the petitions which are not set forth in the two letters mentioned.

One issue appears in Mr. Preloznik's letter which we shall dispose of with celerity. He contends that the permit should have been issued by the Natural Resources Board, for the reason that there is no statutory authority to delegate regulatory powers to Thomas G. Frangos, acting for the Secretary of the DNR. This issue was litigated before and decided by the Hon. Andrew W. Parnell in a separate action. Judge Parnell held that the permit was issued by proper authority, the DNR. We are not of a mind to second guess Judge Parnell, and this issue will not be discussed further.

The threshold inquiry is whether the hearing on the application to construct the dam was a "contested hearing," or one purely legislative in character. Counsel for petitioners contend that it was the former, while Mr. Scott Van Alstyne, appearing on behalf of DNR, argues

that it was the latter. The definition of "contested case" is set forth in Sec. 227.01 (2), Wis. Stats:

> "(2) "Contested case" means a proceeding before an agency in which, after hearing required by law, the legal rights, duties or privileges of any party to such proceeding are determined or directly affected by a decision or order in such proceeding and in which the assertion by one party of any such right, duty or privilege is denied or controverted by another party to such proceeding."

Our Supreme Court in Ashwaubenon v. PSC, 22 Wis.2d 38, 126 NW2d 567, said:

> "We think it clear that this is not a 'contested case.' Sec. 227.01 (2), Stats., defines a contested case as one in which there is a 'hearing required by law.' Although the Commission wisely chose to hold a hearing in this matter, it is not required to do so."

Here a hearing was required by law. Sec. 31.06 Wis. Stats. But we believe that a "hearing required by law" is not the sole criterion. By statute it must be a hearing where the legal rights, duties or privileges of any party to such proceeding are determined or *directly* affected by a decision or order . . ." The position is taken by counsel for Shirley Daly and her co-petitioners that her and their rights as Menominee Indians and as stockholders of Menominee Enterprises, Inc., are and were such as brought the hearing within the ambit of the cited statute. Mr. McConnell as Public Intervenor appeared, as recited in his petition for review, on behalf of the general public. With respect to the position of Shirley Daly as a shareholder or stockholder in Menominee Enterprises, Inc., her dispute is with that corporation and its officers, directors and stockholders over the right to proceed with the application for a permit and over the right of Menominee Enter-

prises, Inc., to convey property. As such these are, you might say, intra-mural in nature, and are not such as were determined or directly affected by the decision to grant the permit. As a Menominee Indian she is, we here determine, classifiable as a member of the general public whose legal rights were not determined or *directly* affected. Her position as a Menominee Indian is identical with that of all members of the Menominee Indian tribe, some of whom are for and some of whom are against the granting of the permit.

Two decisions of the Wisconsin Supreme Court are pertinent here: Ashwaubenon v. PSC, supra, and Hixon v. PSC, 32 Wis.2d 608, 146 NW2d 577. In Ashwaubenon (sometime labeled Ashwaubenon second to distinguish it from Ashwaubenon v. State Highway Commission, 17 Wis.2d 120, 115 NW2d 498) the Town of Ashwaubenon made application for approval by the PSC of a bulkhead line to be placed in the Fox River. Fort Howard Paper Co. intervened in support of the application for approval. It was held that this was not a contested case, Justice Gordon stating that no public hearing was required by statute. It is apparent also, at least to this court, that no legal rights, other than those of the general public, were determined or directly affected, which additionally supported the court's conclusion.

In Hixon the petitioner had placed a breakwater in the navigable waters of Plum Lake. A public hearing was held, and Hixon was ordered to remove the breakwater. This, said the Supreme Court, was a "contested case," not only because a public hearing was required by statute (Sec. 30.12 (2)(a) Wis. Stats.), but:

> "Moreover, the procedure determines the legal rights, duties or privileges of any party (the appellant) to such proceeding and in the proceeding the

> assertion by one party of any such right, duty or privilege is denied or controverted by another party to the proceeding (the public service commission itself, if no one else.")

We hold that the hearing in this matter was not a contested case.

The petitions are nonetheless entitled to judicial review.

> "Even though this was not a 'contested case,' we are presuaded that the right to review is not foreclosed by such fact. Sec. 227.15 and 227.16, Stats., prior to their amendment in 1945, required such circumstance, but the amendment (ch. 511, Laws of 1945)removed this as a condition to judicial review. This court has in effect sanctioned judicial review notwithstanding the absence of a 'contested case.'" Nick v. State Highway Comm., supra (p. 494); Ashwaubenon v. State Highway Comm. (1962), 17 Wis. 2d 120, 115 NW2d 498; Munninghoff v. Wisconsin Conservation Comm. (1949), 255 Wis. 252, 38 NW2d 712." Ashwaubenon v. PSC, supra.

The result of our holding that this was not a "contested case" is this: 1. The DNR was enabled to base its decision on matters not contained in the record made on February 3, 4 and 5, 1970; 2. The requirement of giving personal notice to all interested parties is dispensed with; 3. The fair-play provisions of Sec. 227.07 through 227.13, Wis. Stats., do not apply. Ashwaubenon v. PSC, supra, and Hall v. Banking Review Bd., 13 Wis.2d 359, 108 NW2d 543. But we find here that the DNR permit was granted on matters displayed in the record only; that notice was given to all interested parties; and the fair-play statutes were fully complied with, except as to certain findings and orders hereinafter noted.

It is true that some downstream riparian owners contended that they did not receive the personal notice which they claim was required (Sec. 31.06 (2)). However, such parties appeared by counsel at the hearing in Madison and, although objecting to the jurisdiction, were made aware that the hearing was to be continued in Green Bay on February 3. Further, at such adjourned hearing a number of these same riparian owners gave testimony in opposition. The requirements of due process, even though this be held a "contested case," were not contravened.

It is argued by counsel for DNR that the standards of review to be employed here by this court differ from those applicable to a "contested case." In the review of a legislative hearing, it is argued, we may reverse only if the order of the DNR has been arbitrary or capricious; in the review of a contested hearing we may reverse only if the decision is unsupported by substantial evidence in view of the entire record as submitted. To our mind there is little difference, if any, between the two. For a decision not supported by substantial evidence we would consider to be one that is arbitrary and capricious. But here we need not and will not be concerned with the debate over standards of review. The decision made by the DNR is, we believe, supported by the required quantum of evidence, again, with certain exceptions to be noted later.

Having disposed of what we termed a threshold inquiry, we turn to the merits.

Prior to June 17, 1954 the Menominee Indian tribe resided on lands which were located in Shawano County and Oconto County, which lands had been given to the tribe by the Treaty of Wolf River in 1854:

"In consideration of the foregoing cession, the United States agreed to give, and do hereby give, to said Indians for a home, to be held as Indian lands are held . . ."

On that day, June 17, 1954, the United States Congress enacted 25 USCA 892-902. Among the provisions of that act of Congress were these:

1. The tribal rolls were closed as of June 17, 1954, subject to the reception as tribal members of applicants who might apply for a specified period of time thereafter;

2. The lands held in trust (lands given in the Treaty of 1854) were to be transferred to the tribal corporation (Menominee Enterprises, Inc.) on or before April 30, 1961.

3. When title to the property had been transferred: "Thereafter individual members of the tribe shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to the members of the tribe, and the laws of the several States shall apply to the tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction."

By two deeds each dated April 26, 1961, Menominee tribal lands previously held in trust by the United States were conveyed to the tribal corporation, and such corporation has since been the title holder of record.

In 1967 or 1968 Menominee Enterprises, Inc., obtained a permit for and constructed a dam at or near the western outlet of a small unnamed lake to the west of Watosah Lake, which dam caused a flowing of such unnamed lake,

Watosah and Skice Lakes, the flowage so created being called Legend Lake No. 1. Later Menominee Enterprises, Inc., in conjunction with N.E. Isaacson & Associates, Inc., obtained a permit and constructed a dam at the eastern outlet of Blacksmith Lake, which dam caused a flowing of Blacksmith Lake, Little Blacksmith Lake, Spring Lake and Peshtiga Lake, the flowage so created being called Legend Lake No. 2. In the instant matter the joint venture, Lakes of the Menominees, sought and has received a permit to construct a dam at the eastern outlet of Pywaosit Lake, which will cause a flowing of Pywaosit and Sapokesick Lakes, the flowage so to be created to be called Legend Lake No. 3. Legend Lake No. 1 resulted from the damming of waters flowing westerly into the Wolf River; Legend Lake No. 2 and Legend Lake No. 3 resulted from the damming of waters flowing easterly into the Oconto River. The construction of Legend Lake No. 3 dam will cause a backing up and collection of waters up to and covering Legend Lake No. 2 dam, so that ultimately Legend Lake No. 2 and Legend Lake No. 3 will become but one flowage area.

The DNR, by Sec. 31.06 (3), Wis. Stats., before granting a permit must find that the construction, operation or maintenance of the proposed dam is in the public interest, considering esthetic, economic, and recreational values. Sec. 31.06 (3) further says:

> "The enjoyment of natural scenic beauty is declared to be a public right to be considered along with other public rights and the economic need of electric power for the full development of agricultural and industrial activity and other useful purposes in the area to be served. In considering public rights to the recreational use and natural scenic beauty of the river, the department shall investigate the potential-

ities of the lake and lake shore created by the flowage and shall weigh the recreational use and scenic beauty thereof against the known recreational use and scenic beauty of the river in its natural state, and the department shall further weigh the known recreational use and scenic beauty of the particular section of river involved against the known recreational use and scenic beauty of other sections of the same river and other rivers in the area remaining in their natural state (without regard to plans of other dams subsequently filed or to be filed); if it appears that the river in its natural state offers greater recreational facilities and scenic value for a large number of people than can by proper control of the flowage level be obtained from the use of the lake and lake shore and that the remaining sections of the river and other rivers in the area in their natural state provide an insufficient amount of recreational facilities and scenic beauty, and if it further appears that the economic need of electric power is less than the value of the recreational and scenic beauty advantages of such river in its natural state, the department shall so find and the permit be denied."

The attacks made by petitioners Daly et al. are pointed at specific findings of fact made by DNR, which they contend do not have substantial evidence in their support, considering the record as a whole. We will deal with them seriatum.

Par. 4—The stated purpose of the proposed dam is to create a flowage which will be used for recreation by people who purchase lots in the adjacent subdivisions being developed by the applicants and thereby increasing the tax base in Menominee County and bringing additional monies into the area.

With the first clause of Finding No. 4 there can be no dispute. Whether wise or unwise, it correctly sets forth the stated purpose of the proposed dam. As to the second clause—increasing the tax base and bringing additional monies into the area—there likewise can be no dispute. Certainly, even in the absence of any evidence at all the purchase of lots will surely increase the tax base and will bring additional monies into the flowage area. Counsel for Shirley Daly takes issue with this finding, arguing that while there will be an addition to the tax base and additional money brought into the area, such additions will not be equal to the spiraling tax demand for the support of schools, roads, police protection and the like, which will be created by the expansion in Menominee County population. The variables inherent in the situation referred to by Mr. Preloznik are of an insoluble complexity at this point in time, and a finding of fact such as that demanded by him, i. e., that the new monies will or will not be sufficient to offset the expected rise in tax demands, would be pure speculation. The finding of fact as made by the DNR, limited to the literal meaning of that finding, has substantial evidence in its support. (Trs. 192-290, et seq.)

Par. 5—Menominee Enterprises, Inc., is the owner of the dam site and flowage area. They will deed the property to Lakes of the Menominees.

This finding is disputed by Shirley Daly, et al., they contending that it is not supported by substantial evidence. It is conceded in the brief filed on behalf of petitioner Daly that Menominee Enterprises, Inc., does have title to the land involved. This land was conveyed to it subject to certain restrictions set forth in the deeds. By letter dated July 8, 1971, from Mr. Preloznik it has been

conceded that the restrictions set forth in the deed, with respect to forest crop lands, have been complied with. The balance of the argument is directed at "they will deed the property to Lakes of the Menominees": that while Menominee Enterprises, Inc., has title it may not convey any of the lands to be flowed, or the dam site itself, without authorization given by vote of ⅔rds of the stockholders of Menominee Enterprises, Inc. (Art. XII of the Article of Incorporation of Menominee Enterprises, Inc., attached to petitioners' brief as Exhibit C.) However, Art. VII of the Article of Incorporation reads as follows:

> "The shareholders of the corporation may, as provided by law, create a voting trust for the purpose of conferring upon trustees the right to vote or otherwise represent their shares, by entering into a written voting trust agreement specifying the terms and conditions of the voting trust, and it is contemplated that all of the shares initially issued by the corporation shall be placed in a voting trust."

Resolutions in support of the Legend Lake No. 3 project signed by five members of the voting trust were made a part of the record. The evidence in the record, though sketchy at best, is uncontroverted as to ownership and ability to convey. The statutory requirement relating to ownership is this:

> APPLICATIONS FOR PERMITS TO CONSTRUCT —Any person, firm, corporation or municipality desiring a permit to construct, operate and maintain a dam shall file with the department a written application therefor, setting forth:
>
> (3) In case the application is for a permit to construct, operate and maintain a dam for a private purpose, proof satisfactory to the department that the applicant owns or has an enforceable option to

> purchase the described dam site and at least 65 per cent of the land to be flowed, or the flowage rights on at least 65 per cent of such land." Sec. 31.05, Wis. Stats.

The statement required by the above quoted section was set forth in the application:

EXHIBIT "A"

> "The names and addresses of all the owners of land that may be affected by the construction or operation of said dam, or by any flowage that may be caused thereby, are listed below:
>
> 1. Menominee Enterprises, Inc., Neopit, Wisconsin."

This, apparently satisfying the DNR, was in full compliance with Sec. 31.05 (3) Wis. Stats. The functions of the DNR do not include the determination of stockholders' rights, nor is such a determination a facet of the controversy which we in this proceeding have jurisdiction or authority to decide. The DNR, as of now, is satisfied that Menominee Enterprises, Inc., owns the land, resting their finding on the statement made in the application. The questions raised here by Mr. Preloznik with respect to ability to convey may be and should be raised properly in another forum. If it be there determined that Menominee Enterprises, Inc., although the owner, has no right to convey by reason of a stockholders' dissent, that will be the end of Legend Lake No. 3, or at least the housing development that Lakes of the Menominees proposes to establish on the shores of that lake.

We have been informed that there is presently pending before the Hon. James A. Martineau an action in which Lakes of the Menominees seeks to enjoin certain individuals from interfering with the sale of lots on Legend Lake. The arguments made here may with greater propriety be made to the court in that action.

It is further argued that the decision of the United States Supreme Court in Menominee Tribe of Indians v. United States, 391 U. S. 404, 88 S. Ct. 1705, 20 L.ed. (2d) 697, recognized the right of the plaintiff tribe to have their habitat, the whole of Menominee County and the area here involved in particular, continued in its aboriginal state, untouched by the handiwork of the white man. We do not so read the cited decision. It dealt only with hunting and fishing rights granted to the tribe by the Treaty of Wolf River in 1854. In order to arrive at their decision the majority of the United States Supreme Court read as pari materia with the Termination Act (25 USCA 891-902) Public Law 280 (18 USCA 1162). Public Law 280 gave certain states full criminal jurisdiction over offenses committed by or against Indians in the areas of Indian country within those states. But Public Law 280 said further:

> "Nothing in this section shall deprive any Indians or any Indian tribe, band or community, of any right, privilege or immunity afforded under Federal treaty, agreement or statute, *with respect to hunting, trapping or fishing* or the control, licensing or regulation thereof." (Emphasis by Associate Justice Douglas for the majority.)

Except for the foregoing:

> "(T)he laws of the several states shall apply to the tribe and its members as they apply to other citizens or persons within their jurisdiction." 25 USCA 899.

We are satisfied that the Treaty of Wolf River did not freeze for all time the topography or ecology of the lands and waters now embraced within Menominee County, and the laws of the State of Wisconsin, including Chapter 31 of Wisconsin Statutes, apply to that county and to its citizens as they apply to all other counties and all

other citizens within this State, excepting always state hunting and fishing regulations.

Par. 10—The dam proposed herein is the third and final phase of the Lakes of the Menominees Project.

Whether this finding has or has not substantial evidence in its support does not concern us. It may or may not be the final phase of the Lakes of the Menominees project. What we are concerned with here is the dam on Legend Lake #3. Any application for a future or an additional dam will be subject to the laws of Chapter 31, Wis. Stats., and will be dealt with by proper authorities should such an application be made.

Par. 14—The construction of Legend Lake #1 and Legend Lake #2 has caused a reversal of the ground water table, and thereby caused the water levels of Round, Lamotte, and Keshena Lakes to rise by seepage due to the head differential of approximately 8′.

The foregoing is in effect a multi-finding of fact. First, that before construction of Legend Lakes #1 and #2 the water levels of Round, Lamotte and Keshena Lakes were such that the flow of ground water was from south to north, from Keshena and Lamotte Lakes to Watosah and Skice Lakes, and from Round Lake to Blacksmith and Little Blacksmith Lakes; second, that there has been a reversal of flow so that there is now a flow from north to south, from what were Watosah and Skice Lakes (Legend Lake #1) to Keshena and Lamotte Lakes, and from Blacksmith and Little Blacksmith Lakes (Legend Lake #2) to Round Lake; third, that such reversal of flow is attributable to seepage from Legend Lake #1 and Legend Lake #2; fourth, that such seepage has been caused by a rise in the water level of Legend Lake #1 over previous water levels

of Watosah and Skice Lakes, and a rise in the water level of Legend Lake #2 over previous water levels of Blacksmith and Little Blacksmith Lakes; fifth, that such rise is to a mean sea level height of 845.7 feet.

The chart of the Shawano Quadrangle, Exhibit No. 6, gives mean sea levels as follows: Keshena Lake 837′; Lamotte Lake 836′, and Round Lake 839′. Thus the height of the Legend Lake over Keshena Lake is or will be 8.7′; over Lamotte Lake it is or will be 9.7′; and the height of Legend Lake #2 over Round Lake will be 6.7′. "Approximately 8′ " is near enough to the head differentials recited above. In any event, Par. 14 is a recitation of a fait accompli. The two dams which created Legend Lakes #1 and #2 have been authorized and constructed. The water level of Legend Lake #2 will not be raised by the construction of the dam creating Legend Lake #3. Legend Lake #2 and Legend Lake #3 are to be joined and to become one body of water with the water level of the old and new lakes to be fixed at 845.7′.

Par. 16—Long Lake located to the north of the third phase will not be disturbed or connected to this development, and will be left as a natural wildlife area.

The two key words here are "disturbed" and "connected." It is undisputed that no channel, canal, creek or ditch will be dug or constructed so as to connect, artifically, Long Lake with Legend Lake #3.

Again referring to Exhibit 6, the Shawano Quadrangle, the elevations of the land lying between Legend Lake #3 and Long Lake are, from west to east, 860, 856 and 849 feet. Thus there can be no surface water escaping from Legend #3 which can run north into Long Lake. The

dam level at Legend #3 is to be 845.7 feet. The elevation of Long Lake is the same (TR-182). Although we have no pretentions as an expert in the field, it is reasonable for us to believe, as did the DNR, that water levels being the same no flow of ground water should take place from one lake to the other.

One of the witnesses in opposition was concerned with future pollution of Long Lake, attributable to oil and gasoline escaping into the lake from motor boats. If the water level remains the same, as it should, the lake will be no more accessible in the future than it has in the past. See Exhibits 26 and 27. Finding 16 has substantial evidence in its support.

> Par. 23—The establishment of the trust fund for operation and maintanence of the dam and flowage by the applicants and the conditions of the order herein will comply with the provisions of Sec. 31.14 (2), statutes. This will provide proof to the department and will give reasonable assurances that the dam will be maintained for a reasonable period of time, not less than 10 years.

The trust fund is to be in the sum of $100,000 and is to be created ". . . to give reasonable assurance that the dam will be maintained for a reasonable period of time, not less than 10 years." Sec. 31.14 (2). Here we give weight to the superior expertise of the DNR. The sum of $100,000 invested at six per cent will, by taking interest and principal, produce $1,110 a month over a ten year period before complete exhaustion of the trust fund. The fund must be in such an amount ". . . which in the *department's judgment* will give reasonable assurances . . ." Sec. 31.14 (2). On the record we are satisfied that the department was reasonably assured, and we are as well.

Par. 25—The construction of the dam and flowage will provide access to the area by the public. In the past access has been restricted.

With the second sentence we need not be concerned, it being merely a recitation, true or not, of past history. Exhibit 1, a drawing or scale chart of the area, which was received in evidence, shows a public access area (TR. 176, 177, 216, 233).

Par. 26—The proposed dam and flowage will substitute the orderly developed lake shore scenery of a large lake for the wild primitive scenery of small natural lakes.

The brief filed in behalf of petitioners Daly, et al., while stating that the above finding does not have a substantial evidence in the record makes no further argument. That there will be a large lake instead of a number of small lakes is beyond dispute. Read literally the finding has substantial support in the record.

Par. 27—The proposed dam will not adversely affect the quality of water and will not pollute Linsey Creek, if the applicants meet the conditions of the order herein, and if the land development is properly controlled by Menominee county.

First, the proposed *dam* will not adversely affect the quality of water nor pollute Linsey Creek. This finding is confined to the dam alone, and as so confined is not disputed. There was testimony that the greater surface expanse of Legend Lake #3, over the surface expanse of the smaller lakes which are to be covered by the flowage, will cause a rise in water temperature because of the subjection of the larger water area to the effects of insolation; that the water, being warmer than that which found its way into

Linsey Creek in the past, will have an adverse effect on the trout population of that creek. This, however, was disputed by experts called by the applicants.

What triggered the greatest dispute at the hearing was the proposed housing development; it being contended by the opponents that a large number of septic tanks which allegedly will serve the development will inevitably cause pollution of the waters of Legend Lake #3 and, down stream, of Linsey Creek. Here, again, there was a conflict of experts. Professor Stevenson and Kenneth G. Carlson, a professional engineer, testified flatly that there would be no pollution; while Daniel C. Gaffney, professional engineer, Dr. Wiersma, Dr. Sager and Dr. Loucks testified to the contrary. The credibility of the witnesses and the weight to be given to their testimony is for the administrative agency and not for this court. Copland et ux v. Department of Taxation, 16 Wis.2d 543, 114 NW2d 858; Hilboldt v. Wisconsin Real Estate Brokers Board, 28 Wis.2d 474, 137 NW2d 482.

We read with interest the pronouncement of the experts opposing issuance of the permit. They characterized septic tanks as failures ab initio, testifying that within 10 years Legend Lake #3 will be fully polluted. Chapter 144, Wis. Stats., gives the Department of Natural Resources complete jurisdiction over septic tank sewer systems. By statute, should the department find that effluent from any septic tank is polluting a body of water, the department may order necessary corrections, changes or elimination of the septic tank system. We have greater faith than do those in opposition to the granting of the permit that the provisions of law as set forth in Chapter 144 will be obeyed. Looking at the record as a whole, and taking into considera-

tion the power and authority of the DNR given to it in Chapter 144, Wis. Stats., we find that finding 27 has substantial support in the record.

The foregoing covers the findings of fact objected to by counsel for Shirley A. Daly, et al. We come now to those issues raised by the Public Intervenor. Some of them are factual and some are issues of law. They are, in the order in which Mr. McConnell set them out in his letter of March 29, 1971, as follows:

1. Paragraph 3 of the DNR order provides: "The dam at the outlet of Legend Lake #1 shall be so constructed to prevent any normal out-flow from entering the Wolf River watershed. The plans shall be submitted to and approved by the department prior to any construction. The provisions of Sec. 31.34 are hereby waived."

Mr. McConnell contends that issuance of this portion of the order exceeds the powers and authority of the DNR.

2. Paragraphs 4 and 5 of the DNR order provide: "the dike barrier between Legend Lake #1 and Legend Lake #2 shall be removed in its entirety. The dam at the outlet of Legend Lake #2 as authorized in docket 3-WR-319 shall be removed in its entirety."

It is argued that, because the provisions of Sec. 31.185, Wis. Stats., were not followed, orders 4 and 5 are unlawful.

3. "An illegal diversion of waters from Linzy Creek to the Wolf River watershed have been authorized."

The foregoing issue is taken from the brief of the Public Intervenor, rather than from the discursive exposition of that issue in Mr. McConnell's letter of March 29, 1971.

4. "The water of Linzy Creek and the Wolf River watershed will become polluted as the lake shore development progresses."

5. "Contested dam applications are quasi-judicial proceedings."

Numbers 4 and 5, above have been discussed earlier in this memorandum opinion and will not be touched upon further.

Prior to the construction of dam #3, impounding Legend Lake #3, there were two previous man-created lakes, Legend Lake #1 and Legend Lake #2. Legend Lake #1 was and is in the Wolf River watershed and its outlet, at the western end of Legend Lake #1, permitted the natural water flow of the watershed, from east to west, into the Wolf River (finding of fact #11). Legend Lake #2 is in the Oconto River watershed, and its eastern outlet permitted the natural water flow of that watershed from west to east, into the Oconto River. (Finding of fact #13). As a part of the Legend Lake #2 project a dike and a diversion dam were erected some distance to the southwest of what was Spring Lake, now a part of Legend Lake #2 (finding of fact #12). By sealing the dam at the western end of Legend Lake #1 (finding of fact #18) and removing the dike pursuant to paragraph 4 of the order, and by removal of the diversion dam there will be a stream, canal or creek connection between Legend Lake #1 and Legend Lake #2; and as Legend Lake #2 and Legend Lake #3 are to be one body of water, the waters of the Wolf River watershed will be backed up, find their way into Legend Lake #2 and Legend Lake #3 and become a constituent part of the watershed of the Oconto River (finding of fact #18). This is depicted in "Lakes of the Menominee, area map, dated November 28, 1970.

The issues posed by Mr. McConnell, (court's numbers 1, 2 and 3) are all inter-related and are issues of law. He contends that to have the authority to order removal of the dam creating Legend Lake #2, the provisions of Sec. 31.185 should have been followed, and that they were not. Sec. 31.185, provides that should an owner desire to remove a dam there must be filed a formal application, notices of hearing must be served and published and a hearing must be had on the application. First of all, if the permit for the dam creating Legend Lake #3 be denied, the dam at the outlet of Blacksmith Lake which impounded Legend Lake #2, will remain. If the action of the DNR in granting the permit be affirmed, then the waters of Legend Lake #2 and Legend Lake #3 will become one flowage, and the dam at the outlet of Blacksmith Lake will be, not a dam, but a hazard to navigation. Under these circumstances a meticulous and formal adherence to each and every provision of Sec. 31.185 would be an exaltation of form over substance. But we do find that the provisions of Sec. 31.185, were substantially complied with. As a part of the application for the construction of dam #3, we find this:

> "This application will maintain water elevations at the same levels as permit 3-WR-319 (east lake) presently (March 4, 1969) being processed. In the event that this application is granted we wish to rescind that part of order 3-WR-319 to construct the dam at the outlet of Blacksmith Lake."

In Mr. McConnell's brief we find this:

> "The court's attention is also brought to pages 58-64 inclusive, at which time Mr. Isaacson was asked whether he had received approval to remove the dam between pools 1 and 2 and he answered no and the removal "is not a part of this hearing." This was reaffirmed by Mr. Herro at page 59. The same is true with respect to dam #2."

But in the record (TR-201) the attorney for the applicant stated:

> "Part of our application concerning dam #3 is the removal of dam #2, inasmuch as they are homogenous waters."

We find that the proposed removal of dam #2 was spelled out in the application, that it was so understood by the examiner, and the scope of the entire project was within the knowledge and comprehension of those participating in this hearing. The contention that the DNR, because of a failure to comply with Sec. 31.185, had no authority to order removal of dam 2, is without merit.

Counsel for the applicant objected to questions asked by Mr. McConnell touching upon a possible removal of the dike erected to the southwest of Spring Lake (TR-201). Again it is argued that the portion of the order 3-WR-543 (4), directing removal of the dike was without the powers of the DNR because of a failure to comply with Sec. 31.185, Wis. Stats.

We have studied orders numbered 3-WR-69, 3-WR-418, 3-WR-319 and 3-WR-543. While a good deal of the language in 3-WR-418 and 3-WR-319 is confusing, at least to this court, we are now satisfied of the following: there are three separate factors involved in the interconnection of Legend Lake 1 and Legend Lake 2, ie., a canal dredged by Lakes of the Menominees, running from Legend Lake #1 to Legend Lake #2; a temporary diversion dam across Linzy Creek to the southwest of what was Spring Lake; and a dike, erected across the canal, some distance further to the southwest of the temporary diversion dam. We find this in 3-WR-418 dated February 2, 1969:

The DNR

> "finds it necessary to issue an interlocutory order authorizing the applicants to finish the construction

> of the temporary diversion dam and *canal* and to divert surplus water from Linzy Creek, subject to the conditions contained in the order, which are necessary to insure that only surplus water is diverted and the public interest in Linzy Creek is protected."
>
> and
>
> "Authority is hereby granted to Menominee Enterprises, Inc., and N. E. Isaacson and Associates, Inc., d/b/a Lakes of the Menominees, to complete the diversion words and canal and to divert surplus water from Linzy Creek to Legend (West) Lake starting March 1, 1969 . . .")
>
> "8. This authority shall have no effect and force after findings of fact and final order are issued in this docket."

This order, and whether it was issued under lawful authority does not here concern us, allowed construction of a canal *and* a diversion dam (not the dike) and the diversion of surplus water from Linzy Creek into Legend Lake #1. Whether the canal was dug originally to aid in the diversion process is shadowed in murk and mystery. But of its end result we are now well aware and will touch upon it again later in this opinion. In 3-WR-319 (permit for dam #2) the DNR said:

> "The applicant has constructed a temporary dam to divert water from the stream on which the proposed dam (dam #2) will be constructed. The temporary dam will be removed completely when the proposed dam is constructed."
>
> and
>
> "3. The temporary diversion dam shall be completely removed from the flowage before it is filled."

Thus in 3-WR-319 and in 3-WR-418, there is nothing at all pointing at either the construction or the removal of a dike; and although 3-WR-418 authorized the construction of a canal and of the diversion dam, and while

3-WR-319 says that the diversion dam shall be removed when dam #2 is constructed, 3-WR-319 is completely blank with respect to the canal. The diversion dam, we repeat, was built to impound waters of Linzy Creek, which waters were to be pumped into Legend Lake #1. Legend Lake #1 is now, as we understand it, at or near its authorized level. Thus the temporary diversion dam is of no further utility and its removal is in conformity with the various orders previously issued.

Referring once more to Exhibit 6, Shawano Quadrangle, it is evident that the high ground or divide which separated the Oconto River and Wolf River watersheds runs from the northwest corner of Section 18, Township 28 North, Range 15 East, to the southeast corner of Section 18, and then further southeasterly to a point on the east line of Section 20, Township 28 North, Range 15 East, about a quarter of a mile north of the southeast corner of the latter section. Elevations of the divide average out to about 870 feet above sea level as compared to 834 to 837 feet both to the northeast and the southwest of the high ground or divide just now described.

The dike, apparently, was built for the purpose of preventing an inter-mingling of the waters of Legend Lake #1 and Legend Lake #2 which, with the construction of the canal, would otherwise have become one body of water. Now, with the removal of the dike, Legend Lake #1 and Legend Lake #2 are or will be joined, will have the same water level, (845 plus feet) and Legend Lake #1 becomes or will become, with removal of the dike, a part of the Oconto River watershed, all this made doubly so by the sealing of dam #1. Thus the principal, the overriding fatcor, in the shifting of a part of the Wolf River

watershed to the Oconto River watershed is, in association with the sealing of dam #1 and the removal of the dike, the dredging of the channel through the watershed divide between Legend Lake #1 and Legend Lake #2.

From all of the foregoing it is apparent that sealing up dam #1 and the removal of the dike (now that there is a channel to Legend Lake #2) will work a drastic change in Legend Lake #1. Certainly, if the dike is not removed and dam #1 is sealed, Legend Lake #1 will have no outlet either to the east or to the west and it would then become the Dead Sea of Menominee county. Either the dike remains (or is rebuilt) to prevent a comingling of Legend Lake #2 with Legend Lake #1, and dam #1 must be kept open, to allow the continued flow of the waters of Legend Lake #1 into the Wolf River; or dam #1 must be sealed and the dike removed so that Legend Lake #1 will have an outlet into Legend Lake #2 and, ultimately into the Oconto River.

Mr. McConnell contends further (issue 3 posed by the court) that the granting of the permit for dam #3 will result in an illegal diversion of Linzy Creek waters from the Oconto River watershed to the Wolf River watershed. Illegal because as he says,

> "this needs a permit which has not been applied for, as required by statute."

The diversion has been accomplished by reason of seepage from Legend Lake #1 into neighboring lakes to the south. This seepage will lower the level of Legend Lake #1, and to maintain that lake at its assigned level waters of the Oconto River watershed must be backed up from Legend Lake #2 and 3 into Legend Lake #1, a part of the Wolf River watershed. The statute upon which he relies is Sec. 30.18, Wis. Stats., This says that it is lawful, *if a permit is obtained therefor:*

> "to temporarily divert the flow of water of any stream for the purpose of bringing back or maintaining the normal flow of water in any navigable lake or for maintaining the normal flow of water in any navigable stream, regardless of whether such navigable stream is located within the watershed of the stream from which the surplus water is diverted."

To obtain such a permit it is necessary that there be a formal application, a notice and a hearing.

It is apparent that dam #3, of itself, will not cause such a diversion. Dam #3 will inhibit the flow of water from the outlet of Pywaosit Lake until a level of 845 to 845.7 feet is reached in Legend Lake #3. The water flow of Linzy Creek will then continue unabated by the dam itself. Whatever diminution in flow may then occur will come about through seepage, evaporation and evapotranspiration, but it is not seepage, evaporation or evapotranspiration with which Sec. 30.18, Wis. Stats., is concerned. The diversion of waters at which that statute is pointed is a diversion to be accomplished by a canal, pipes or tunnels. Sec. 30.18 (3)(b) and (c). Seepage maintains ground-water tables while evaporation and evapotranspiration bring the rain. As such neither is within the purview of Sec. 30.18, Wis. Stats.

When we consider the removal of the dike southwesterly of Spring Lake and the sealing of dam #1, both in conjunction with the removal of dam #2, we find that Linzy Creek will be backed up all the way to and into Legend Lake #1 which is a part of the Wolf River watershed. But this backing up of Linzy Creek into Legend Lake #1 cannot properly be labeled a diversion. For if it be considered that Linzy Creek now runs from the dike southwesterly of Spring Lake easterly through Legend Lake #2 and Legend Lake #3 into the Oconto

River, it will, after removal of the dike, run from dam #1 on Legend Lake #1 through Legend Lakes 1, 2 and 3, still finding its way into the Oconto River. Again, in this situation, any Linzy Creek loss of flow will be attributable to seepage, evaporation and evapotranspiration, which Sec. 30.18, Wis. Stats., was not designed to curb or regulate.

We therefore determine that the legal issue posed by those portions of the order requiring the sealing of dam #1 and the removal of the dike are not rooted in the provisions of Sec. 30.18 or 31.185, Wis. Stats. We have held that the part of the order authorizing the removal of dam #2 was properly predicated on the application for construction of dam #3. We also determine that the removal of the diversion dam was authorized by 3-WR-319. But the orders for removal of the diversion dam as set out in 3-WR-418 and 3-WR-319, were issued so that by such removal the waters of Linzy Creek, theretofore impounded by the diversion dam to aid in filling Legend Lake #1, would thereafter flow, unimpeded, into Legend Lake #2. Now, however, with the dredging of the channel from Legend Lake #1 up to the dike, the removal of such dike brings a result not contemplated in the previous proceedings, (3-WR-69, 3-WR-418, 3-WR-319): the joinder of Legend Lakes #1, and #2 and the drainage of a part of the Wolf River watershed into the Oconto River watershed. Should the dike remain (or be replaced) it would or should separate the waters of Legend Lake #1 and Legend Lake #2, and frustrate the purpose, now revealed, for which the channel was dredged. But, by Sec. 30.19, Wis. Stats., the channel, as a channel connecting two navigable bodies of water (distinguishing it from a channel to aid in a temporary diversion of waters) should not have been dredged in the first place.

"Unless a permit has been granted by the department or authorization has been granted by the legislature, it is unlawful

(b) To connect any natural or artifically constructed . . . lake . . . with existing bodies of navigable water for navigation or any other purpose."

We have then the question before us of whether the sealing of dam #1, the dredging of the channel and the removal of the dike, the latter as viewed in the light of accomplished realities, are legitimate or illegitimate offspring of the application for the permit to build dam #3.

The application filed March 11, 1969, with the Public Service Commission is entitled: "In the Matter of the Application of Menominee Enterprises, Inc., and N. E. Isaacson and Associates, Inc., d/b/a Lakes of the Menominees for a Permit to Construct, Operate and Maintain a dam in the Pywaosit Lake outlet of Linzy River at (or near) Keshena, Wisconsin, for the purpose of Recreation, Fish, Wild Life, Subdividing." Then follow various factual allegations covering location, type of construction, ownership and like matters, none of which allegations are pointed, even by inference, at the sealing of dam #1 or the dredging of the connecting canal, or the removal of the dike, all to accomplish the consequent reversal of the flow of Legend Lake #1 from the Wolf River into the Oconto River. There was likewise submitted, as a part of the application, a map or chart depicting the area to be affected by dam #3 (see paragraph 14 of the application). The westerly edge of this map is a number of miles east of dam #1 and about two miles east of the dike and the dredged canal.

It might be said that the canal between Legend Lake #1 and Legend Lake #2 was dredged under the authority of 3-WR-418 and that it is thus outside of the review of the

order permitting construction of dam #3, 3-WR-543. But 3-WR-418 spelled out the purpose for which the canal was to be dug: it was to aid in the "temporary" diversion of waters of Linzy Creek into Legend Lake #1. We can find no indication in any of the orders preceding 3-WR-543, or in the record of the present proceedings, that the canal was to remain as a constitutent part of the Lakes of the Menominees project, Legend Lakes #1, #2 and #3, as a connecting water-way between Legend Lake #1 and Legend Lake #2. Nor is there anywhere in the documents made available to us by counsel the least foreshadowing of that part of the order, 3-WR-543, directing the sealing off of dam #1.

In his brief Mr. Van Alstyne quoted Sec. 31.12 (1) and (2), Wis. Stats., in support of his argument that DNR order for dam #3 did not exceed its statutory powers. Sub-sec. (2) of the statute reads:

> "The department may investigate and determine all reasonable methods of construction, operation, maintenance, and equipment for any dam so as to conserve and protect all public rights in navigable waters and so as to protect life, health and property; and the construction, operation, maintenance and equipment, or any or all thereof, of dams in navigable waters shall be subject to the supervision of the department and to the orders and regulations of the department made or promulgated under this chapter."

But this subsection and subsection 1 of Sec. 31.12, are all pari materia with Sec. 31.06 Wis. Stats.; which later statute requires an application, notices and a hearing *on the application.* As we read the statute, if we accepted the validity of Mr. Van Alstyne's argument, it is within the powers of the DNR, in considering an application to build a dam on the Oconto River, to order the construction of a dam

on the Wolf River. While the powers of the DNR are no doubt extensive, such orders as are issued by it should be in conformity with and limited to matters contained in or to be reasonably inferred from the application. Otherwise those who might appear in opposition to an Oconto River dam might well find themselves with a dam on the Oconto River and a dam on the Wolf River as well, with no one having had an opportunity to raise his or her voice either in opposition to or in favor of the Wolf River dam.

We have viewed dam #3 at the western end of Legend Lake #1 and the wooded area lying to the west of such dam. From our observations of this area the outflow of the waters to the west of Legend Lake #1, prior to the construction of dam #1, might, just possibly, have been deep enough to float a toy sailboat. But we take notice that in 3-WR-69 paragraph 4 of the finding of fact recites:

> "The outlet stream of Wahtosah Lake is navigable in fact."

To eliminate a navigable outlet stream by sealing it off with an impenetrable dam and, in effect, reversing the flow of such navigable outlet into another watershed should require more than a magister dixit by the DNR.

Paragraph 3 of the order in 3-WR-543, relating to the sealing of the dam at the western end of Legend Lake #1, has as its concluding sentence, "The provisionsof Sec. 31.34 are hereby waived." Sec. 31.34, Wis. Stats., is a penal statute which imposes a criminal penalty, a fine of not less than $50 nor more than $1,000, should any person, firm or corporation fail to pass at all times at least 25% of the natural low flow of water of the stream upon which such person, firm or corporation maintains a dam. There are two exceptions: 1. Where the water is discharged directly into a lake, mill pond, storage pond or cranberry marsh;

and 2. If in the opinion of the department (DNR) such minimum discharge is not necessary for the protection of fish life. Nowhere in the record, or in the findings of fact in 3-WR-543, can we discover anything which would allow either exception. The issuance of this portion of the order, waiving a penal statute, we characterize here as both lordly and cavalier.

Mr. McConnell argues that the closing of a navigable stream is unconstitutional, and can be done neither by the DNR as a part of its legislatively delegated powers, nor by the delegator, the legislature itself. His argument has merit but we need not consider it at this time. We are satisfied that paragraph 3 of 3-WR-543 is not predicated upon any finding of fact or evidence in the record, and that it is, insofar as that docket is concerned, considering the application filed therein, filius nullius. So, too, is paragraph four of the order, directing removal of the dike between Legend Lake #1 and Legend Lake #2. Neither paragraph of the order, (3) or (4), are founded upon or stem from the application, the evidence presented or the record made.

If a proceeding to amend 3-WR-69, the order permitting dam #1, be initiated, looking to the sealing of such dam, those in opposition will have an opportunity to be heard and all constitutional questions may then be raised. Similarly, if proceedings be initiated looking to the obtaining of a final order in docket 3-WR-418, which will permit the continued existence of the canal and the removal of the dike, with the consequent joinder of the waters of Legend Lake #1 with Legend Lakes #2 and #3, those in opposition will have a forum in which they may voice their complaints. We say here, only, that paragraphs 3 and 4 of the order are, in the context of 3-WR-543, and the application filed therein, improvident and unlawful.

We realize that, if the hearing of February 3, 4 and 5, 1970, was legislative rather than contested, the DNR had a much wider field within which to operate. It might then be argued that the agency was empowered to consider evidence dehors the record and base its findings and paragraphs 3 and 4 of the order on matters which were then, though undisplayed in the record, within its own knowledge; and thus legitimatize the provisions of 3-WR-543 with which we have found fault. But we believe, nonetheless, that, legislative or contested, once an application has been made, notices of public hearing have been published and served, and an extensive record has been made, fair play to the general public requires an order or orders which are within the frame work of the application, the notices, and the record made at the hearing. To straddle the position taken by Mr. Van Alstyne, and the position taken by Mr. McConnell and Mr. Preloznik, we hold that paragraphs 3 and 4 of the order are arbitrary and capricious, and are without substantial support in the evidence considering the record as a whole.

Pursuant to the authority of Sec. 227.20, Wis. Stats., we modify 3-WR-543 by striking therefrom paragraphs 3 and 4 of the order. In all else 3-WR-543 is affirmed. The restraining order signed by this court on June 19, 1971, is dissolved.

We have just received in this morning's mail (August 12, 1971) a photo-copy of the title page of 3-WR-319. This title page sets out, in addition to the caption of 3-WR-319, the caption of 3-WR-418 and also that of 3-WR-419, the last reading as follows:

> "Application of Menominee Enterprises, Inc. and N. E. Isaacson and Associates, Inc. d/b/a Lakes of the Menominees, a Joint Venture, for a Permit to Con-

> struct a Channel Between East Lake (Proposed) and Legend (West) Lake in the Town of Menominee, Menominee County, to Connect Spring Lake and Legend (West) Lake."

In view of the lateness of the receipt of this title page we will not redraft our memorandum opinion. The interlocutory order in 3-WR-418 should have borne the caption in 3-WR-419 as well, inasmuch as the order in 3-WR-418 set forth the determination of the DNR on both 3-WR-418 and 3-WR-419, it giving authority to divert water from Linzy Creek and to construct the channel. But 3-WR-418 was a temporary order only and by its terms:

> "This authority shall be of no effect and force after findings of fact and final order are issued in this docket."

Again, the removal of the dike, the sealing of dam #1 and the dredging of the channel were and are no part of 3-WR-543. If Lakes of the Menominees wish to obtain a final order in 3-WR-418-419, they may do so. We will not countenance or give it validity here.

Mr. McConnell may draft an order in conformity with the foregoing memorandum opinion and, after submitting such order to all counsel for their approval as to form, present it to this court for signature. It will be understood by the court that while Mr. McConnell is to draft the order it will carry his approval as to form only.

Dated this 12th day of August, 1971.

Lewis J. Charles,
Circuit Judge

APPENDIX C

STATE OF WISCONSIN CIRCUIT COURT
DANE COUNTY

SHIRLEY DALY, et al.,

Petitioners.

#131403 *vs.*

NATURAL RESOURCES BOARD OF
THE STATE OF WISCONSIN,

Respondent.

ROBERT B. McCONNELL,
Public Intervenor,

Petitioner,

#131405 *vs.*

DEPARTMENT OF NATURAL RESOURCES
STATE OF WISCONSIN,

Respondent.

JUDGMENT
(Issued September 9, 1971)

NOW, ON MOTION of Robert B. McConnell, Public Intervenor,

IT IS HEREBY ADJUDGED, that the Findings of Fact, Conclusions of Law and Order of the Department of Natural Resources dated September 14, 1970, be and the same are:

1. Vacated and set aside insofar as it authorizes the sealing of Dam No. 1 on Legend Lake No. 1 as set forth in ordering paragraph No. 3 of said order.

2. Vacated and set aside insofar as it authorizes removal of the dike barrier between Legend Lake No. 1 and Legend Lake No. 2 as set forth in ordering paragraph No. 4 of said order.

3. In all other respects the order issued by the Department of Natural Resources in docket No. 3-WR-543, except as modified above, is hereby affirmed and the restraining order signed by this court on June 19, 1971, be and is hereby dissolved.

Dated this 9th day of September, 1971.

By the Court:
/s/ *Lewis J. Charles*
Lewis J. Charles
Acting Circuit Judge

APPENDIX D

BEFORE THE
DEPARTMENT OF NATURAL RESOURCES

Application of Menominee Enterprises, Inc., and N. E. Isaacson and Associates, Inc., Doing Business as Lakes of the Menominees, for a Permit to Construct, Operate and Maintain a Dam in the Pywaosit Lake Outlet of Linzy Creek in Menominee County for Recreation, Fish and Wildlife and Subdivision Purposes

FINDINGS OF FACT, PERMIT AND ORDER
3-WR-543
September 14, 1970

Menominee Enterprises, Inc., and N. E. Isaacson & Associates, Inc., doing business as Lakes of the Menominees, a joint venture, on March 11, 1969, completed filing an application with the Department for a permit under Chapter 31, Statutes, to construct, operate and maintain a dam in Linzy Creek at the outlet of Pywaosit Lake in the Town of Menominee, Menominee County, *Permit granted.*

Pursuant to due notice, hearing was held at Madison on July 7, 1969, before Examiner Maurice H. Van Susteren.

Appearances: (July 7, 1969)

For the Applicants:
N. E. Isaacson & Associates, Inc., by
Charles J. Herro, attorney
Oconomowoc
Lakes of the Menominees, by
James R. Modrall, attorney
Milwaukee
Menominee Enterprises, Inc., by
Maurice J. McSweeney, attorney
Milwaukee

In Support of the Application:
Menominee Enterprises, Inc., by
George W. Kenote
Keshena

In Opposition:
Citizens Association for Advancement of Menominee People, by
Mary Blumreich, for the League of Nations and Pan-American Indians
Neopit
Constance W. Deer
Menominee Indian Reservation
Mrs. Sanford Fowler
Neopit
Shirley Daly
Neopit
Oconto County
Town of Underhill
Oconto County Sportsman's Alliance
13 Riparian Owners on Linzy Creek, by
Howard W. Eslien, attorney
Oconto Falls, by
Jan Stephen Wheeler, attorney of counsel
Madison
Scientific Areas Preservation Council of Wisconsin, by
Orie Loucks, professor of botany, University of Wisconsin
Department of Natural Resources, Division of Fish, Game and Enforcement, by
Edward Main, attorney
Madison

As Interests May Appear:
Robert B. McConnell, public intervenor
Department of Health and Social Services,
Division of Health, by
Gregory A. Vander Velden, public health engineer
Of the Staff of the Division of Environmental Protection:
Gerald P. Wallin, acting chief, water regulation section

The above hearing was adjourned and further hearing was held at Green Bay on February 3, 4, and 5, 1970, before Examiner Maurice H. Van Susteren on February 3 and 4 and before Examiner Edward Main on February 5, 1970.

Appearances: (February 3, 4, and 5, 1970)
N. E. Isaacson & Associates, Inc., and
Menominee Enterprises, Inc., d/b/a
Lakes of the Menominees, applicant, by
N. E. Isaacson & Associates, Inc., by
Charles J. Herro, attorney, and
Kenneth Carlson, professional engineer
Menominee Enterprises, Inc., by
James R. Modrall, attorney
Theodore S. Boyd, vice president

In Support of the Application:
Menominee Enterprises, Inc.,
Common Stock & Voting Trust, by
George W. Kenote, chairman
Midwestern States Regional Council IV, Local 302
International Woodworkers of America, AFL-CIO, by
Gerald Blaschka, secretary-treasurer
Moshayquit Lake Association, by
John Karel
Appleton

Northeastern Wisconsin Regional Planning Commission, by
Gordon A. Bubolz, chairman

In Opposition:

Oconto County, by
Morris Rymer, chairman, Oconto County Board

Oconto Electric Cooperative, by
Howard W. Eslien, attorney
Harry Heiden, secretary

(a) Town of Underhill (Oconto County)

(b) Riparian Owners: Norman Wasmund, George Frank, John Wackrow, Henry Hintz, Arnold Morrien, Alfred Runge, Alfred Strei, Erv. Dittman, Bernard Stewart, by
Howard W. Eslien, attorney
Larry L. Jeske, attorney

Scientific Areas Preservation Council, by
Orie L. Loucks, professor of botany

Appearances: (Continued)

Save Our Sylvania Action Committee and Wisconsin Ecological Society, by
Fred A. Reiter, attorney
Owen Phelps, member of the Board of Directors and Officer

Mary Blumreich, League of Nations and Pan-Am. Indians

Shirley A. Daly

Constance W. Deer, Menominee Indian Reservation

Constance E. R. Deer

Agnes Dick, League of Nations and Pan-Am. Indians

Loretta V. Ellis, vice president NCAI and chairman, Great Lakes Inter-Tribal Education Comm.
Louise Fowler
Genevieve Hein, Menominee Indian Action
Joseph M. Katchicum, Menominee Reservation
Dorothy Leon, Menominee Indians
Francis Leon, Menominee Indians
Evelyn Otradovec, Menominee Indian Action Association
Mrs. Genevieve Otravdovec, Menominee Stockholder
Irvin Otradovec
Roger Otradovec
Eleanor Riesterer, Menominee Indian Action
Louis Vigue
Jennie Weso
Monroe M. Weso, Menominee Indians
Mrs. Margaret L. Wilber
Elmer A. Yorde

As Interests May Appear:
Clients residing in and having an interest in Menominee Enterprises, Inc., as Menominees & stockholders, by
Joseph F. Preloznik, director
Wisconsin Judicare
Daniel E. Gaffney
Department of Health & Social Services,
Division of Health, by
Oscar O. Egger, district public health engineer
Fond du Lac
Donald H. Kemps
Senator Reuben LaFave, by
Faith Moulin
State Capitol

Robert B. McConnell, public intervenor
Irene Mack Quijano
James H. Wiersma
Department of Natural Resources,
Division of Fish, Game and Enforcement, by
Edward Main, attorney
James Kurtz, attorney

FINDINGS OF FACT

1. Menominee Enterprises, Inc., and N. E. Isaacson & Associates, Inc., doing business as Lakes of the Menominees, filed an application with the Department on March 11, 1969, for a permit to construct, operate and maintain a dam in Linzy Creek, Menominee County. Thereafter, the Department set the matter for public hearing at Madison on July 7, 1969. Notice of the time and place of hearing was given to the applicant who, pursuant to Department order, caused the notice of the time and place of hearing to be published in the Shawano Evening Leader, a newspaper of general circulation published at Shawano, Shawano County, once each week for three successive weeks before the dates of hearing, the first publication being on June 11, 1969, and the last on June 25, 1969. A copy of the notice of hearing was mailed to the clerks of Menominee County and the Town of Menominee, which are the county and town wherein the proposed dam and flowage are located. On June 13, 1969, the applicant, pursuant to said order, mailed by registered mail in a sealed and postpaid envelope properly addressed, notice of the time and place of hearing to all persons whose lands will be affected by the proposed dam and whose postoffice address could, by due diligence be ascertained, which notice included a general statement

of the nature of the application. Proof of such publication and the giving of such notice was duly filed with the Department.

The Department on December 18, 1969, issued notice of further hearing to be held at Green Bay on February 3, 1970.

2. The dam will be located across Linzy Creek near the outlet of Pywaosit Lake in the northwest quarter of the northeast quarter of section 23, township 28 north, range 16 east, Town of Menominee, Menominee County.

3. Linzy Creek is navigable in fact at the location of the proposed dam.

4. The stated purpose of the proposed dam is to create a flowage which will be used for recreation by people who purchase lots in the adjacent subdivisions being developed by the applicants and thereby increasing the tax base in Menominee County and bringing additional monies into the area.

5. Menominee Enterprises, Inc., is the owner of the dam site and flowage area. They will deed the property to Lakes of the Menominees.

6. The dam will consist of an earthen embankment approximately 1,200 feet in length with a top elevation of 852.0 feet. The embankment will have a top width of 30 feet with an upstream slope of 10:1 and a downstream slope of 6:1. It will consist of homogeneous sand. An emergency spillway will be provided to the north by excavation with a crest at elevation 847.0 feet. This crest will be 100 feet in width. The principal spillway, to be located in natural ground on the south end of the embankment, will consist of an intake 92 feet in length with a crest at

elevation of 845.5 feet. There will be a 48-inch diameter corrugated metal pipe leading to the structure with a 60-inch diameter CMCP for the outlet. There will be a 36-inch slide gate at elevation 831.0 feet for drawdown purposes. A 12-inch diameter slide gate at elevation 835.0 feet will provide for the required minimum and normal flow. The dam will hold a normal pool at elevation 845.0 feet and a normal head of approximately 13 feet.

7. The proposed dam will not be capable of developing hydraulic power.

8. The nearest municipality to the proposed dam is the Village of Keshena, which is about six miles distant therefrom.

9. Elevations herein are referenced to a benchmark which is a spike in an 18-inch diameter oak tree on the south side of Blacksmith Lake along road from County Trunk Highway "VV". Elevation is 841.06 feet, U.S.G.S. datum.

10. The dam proposed herein is the third and final phase of the Lakes of the Menominees project.

11. Phase one was authorized in docket 3-WR-69 dated January 18, 1968, which issued a permit to construct a dam at the outlet of Watosah Lake in the southwest quarter of the southwest quarter of section 24, township 28 north, range 15 east. This authorization was to Menominee Enterprises, Inc. This dam formed what is known as Legend Lake #1 by flooding out Watosah and Skice Lakes. These lakes are in the Wolf River Watershed.

12. In docket 3-WR-418, the Department issued an interlocutory order authorizing the applicants herein to divert surplus water from Linzy Creek to Legend Lake #1.

This order also authorized the construction of a temporary diversion dam on Linzy Creek. This order was issued subject to the conditions listed in said order.

13. In docket 3-WR-319, dated August 4, 1969, the Department granted authorization to the applicants to construct a dam at the outlet of Blacksmith Lake on Linzy Creek in the northeast quarter of the southeast quarter of section 16, township 28 north, range 16 east. This dam formed Legend Lake #2 by flooding out Blacksmith, Little Blacksmith, Spring and Pestiga Lakes. Linzy Creek passes through these lakes and is in the Oconto River Watershed.

14. The construction of Legend Lake #1 and #2 has caused a reversal of the groundwater table and thereby caused the water levels of Round, LaMotte and Keshena Lakes to rise by seepage due to the head differential of approximately 8 feet.

15. The construction of phase three may also cause the levels of Sand, Little Sand and Pine Lakes to rise due to the differential head that will be created.

16. Long Lake located to the north of the third phase will not be disturbed nor connected to this development and will be left as a natural wildlife area.

17. The three lakes will be connected by the removal of the dam described in Finding No. 13 and by removal of a dike barrier between Legend Lake #1 and #2. The removal of the dike barrier will connect waters of the Wolf River Watershed and the Oconto River Watershed.

18. To prevent the waters of the Oconto River Watershed from entering the Wolf River Watershed, it will be necessary to make certain structural changes in the dam described in Finding No. 11. These changes will in effect move the Oconto Watershed further to the west to include the entire watershed of Legend Lake #1.

19. The removal of these barriers will create a lake approximately seven miles in length that will be irregular in shape. The total lake will have a surface area of 1,340 acres and will have approximately 40 miles of shoreland. The total project area is 5,170 acres of which approximately 53 percent will be left undeveloped. Also, approximately 35 percent of the lakeshore will be undeveloped.

20. The dam will be designed to provide a minimum level of the lake at elevation 845.0 feet and a maximum level of 845.7 feet except during flood stage.

21. The soils where the dam and lakes are located are generally of the Omego loamy-sand type which has severe limitations in reservoirs and embankments. This fact has been confirmed by the construction of lakes #1 and #2, which have seepage problems and require pumping of other waters to maintain their levels. A substantial cost will be incurred if pumping is required to maintain the lakes until they seal themselves.

22. To insure the success of the project and to maintain normal levels it will be necessary to condition the permit and also provide a trust fund.

23. The establishment of the trust fund for the operation and maintenance of the dam and flowage by the applicants and with the conditions of the order herein will comply with the provisions of section 31.14(2), Statutes. This will provide proof to the Department and will give reasonable assurance that the dam will be maintained for a reasonable period of time, not less than ten years.

24. The only dam upstream is that authorized in docket 3-WR-319 and the nearest dam downstream is at the outlet of Moshawquit Lake, which is approximately ½ mile from the dam site.

25. The construction of the dam and flowage will provide access to this area by the public. In the past, access has been restricted.

26. The proposed dam and flowage will substitute the orderly developed lakeshore scenery of a large lake for the wild, primitive scenery of small natural lakes.

27. The proposed dam will not adversely affect the quality of water and will not pollute Linzy Creek if the applicants meet the conditions of the order herein, and if the planned development is properly controlled by Menominee County.

28. The cost, operation and maintenance of the proposed dam will be in the public interest, considering aesthetic, economic and recreational values.

CONCLUSIONS OF LAW

1. In accordance with the foregoing findings of fact and under sections 31.60(3) and 31.14(2), Statutes, a permit for said dam issues by operation of section 31.06, Statutes.

2. The Department has jurisdiction under section 31.11, Statutes, to issue a certificate evidencing the grant of the permit as applied for.

PERMIT

AND THERE HEREBY DOES ISSUE AND IS GRANTED to the applicants, Menominee Enterprises, Inc., and N. E. Isaacson and Associates, Inc., doing business as Lakes of the Menominees, a joint venture, a certificate evidencing the grant of a permit allowed by section 31.06(3), Statutes, for a dam across the outlet stream of Pywaosit Lake known as Linzy Creek in the northwest quarter of the northeast quarter of section 23, township 28 north, range 16 east, Menominee County, subject to the conditions in the order which hereinafter follows.

ORDER

1. No construction of the proposed dam shall be commenced until plans for the structure have been approved by the Department as provided in section 31.12, Statutes.

2. The maximum level shall be at elevation 845.7 feet and the minimum at elevation 845.0 feet, insofar as it can be accomplished by operation of said dam.

3. The dam at the outlet of Legend Lake #1 shall be so reconstructed as to prevent any normal outflow from entering the Wolf River Watershed. The plans shall be submitted to and approved by the Department prior to any construction. The provision of section 31.34 are hereby waived.

4. The dike barrier between Legend Lake #1 and Legend Lake #2 shall be removed in its entirety.

5. The dam at the outlet of Legend Lake #2 as authorized in docket 3-WR-319 shall be removed in its entirety.

6. All the material removed from the dike and dam #2 shall be placed at a location out of the proposed and existing flowage areas.

7. The applicants shall continue to provide to the Department the data ordered in docket 3-WR-418 for a period of not less than five years from the date of the order herein.

8. The applicants shall also provide the following additional data along with that required in the foregoing paragraph:

a. Daily flows at the outlet of the proposed dam.

b. Shall install permanent gaging stations at the following locations:

1. At the outlet of Moshawquit Lake.
2. At the inlet streams designated by the Department.

c. Install gages and record the levels, in mean sea level datum, of the following lakes daily:

1. Round Lake
2. Sand Lake
3. Little Sand Lake
4. Pine Lake
5. Long Lake

9. That N. E. Isaacson & Associates, Inc., and Menominee Enterprises, Inc., doing business as Lakes of the Menominees, shall retain ownership of the dam for a period of not less than five years from the date of the order herein.

10. That N. E. Isaacson & Associates, Inc., and Menominee Enterprises, Inc., doing business as Lakes of the Menominees, shall establish a trust fund in the amount of $100,000 with a trustee to be approved by the Department of Natural Resources prior to establishment of the said trust fund. The $100,000 shall be provided in its entirety from the assets of N. E. Isaacson & Associates, Inc. The terms of said trust shall also be subject to approval of the Department of Natural Resources prior to the establishment of said trust and said terms shall, among other things, provide that all disbursements from said trust shall be subject to approval by the Department of Natural Resources and said disbursements shall be limited to repairs and other expenses occurring in connection with the dam and maintenance of the flowage to be known as Lakes of the Menominees.

11. An impervious material shall be placed along the south shoreline of the new flowage adjacent to County Trunk Highway "VV" at all locations within 500 feet of said highway. The exact location and plans for such must be approved prior to installation.

12. Within one year after the flowage has attained its normal level, the bed of the entire lake shall be conveyed to the State of Wisconsin to be held in trust for all its citizens.

13. The applicant shall clear trees and brush from the entire flowage area before commencement of filling the lake, except those areas designated for wildlife use and shall be approved by the Department of Natural Resources.

14. The applicants shall waive any objections to the free and unlimited inspection of the premises, site, or facility at any time by any employe of the Department for the purpose of investigating the construction, operation and maintenance of the project.

15. The authority granted herein shall include the entire project and shall be in addition thereto to all orders previously issued to the applicants relative to this project.

Dated at Madison, Wisconsin, September 14, 1970

STATE OF WISCONSIN DEPARTMENT OF NATURAL RESOURCES

For the Secretary

By *Thomas G. Frangos,*

Thomas G. Frangos, Administrator

Division of Environmental Protection

APPENDIX E

Wisconsin Statutes

Chapter 31 Regulation of Dams and Bridges Affecting Navigable Waters

31.05 Applications for permits to construct. Any person firm, corporation or municipality desiring a permit to construct, operate and maintain a dam shall file with the department a written application therefor, setting forth:

(1) The name of the navigable waters in or across which a dam is proposed to be constructed and a specific description of the site for the proposed dam.

(2) The purpose or purposes for which the proposed dam is to be constructed, operated and maintained.

(3) In case the application is for a permit to construct, operate and maintain a dam for a private purpose, proof satisfactory to the department that the applicant owns or has an enforceable option to purchase the described dam site and at least 65% of the land to be flowed, or the flowage rights on at least 65% of such land. This subsection shall not apply to a person who has the power of eminent domain.

(4) A general description of the proposed dam, of the material to be used in the construction thereof, and a general description of all booms, piers, and other protection works to be constructed in connection therewith.

(5) The approximate amount of hydraulic power that the proposed dam is capable of developing.

(6) The location of the nearest city or village and of the nearest existing dam above and below the site of the proposed dam.

(7) A map on the scale of not less than 4 inches to the mile showing the lands that may be affected by the construction, operation or maintenance of the proposed dam, or by any flowage that may be caused thereby and approximately the outline of such flowage, which map shall indicate the ownership of each tract of land within the flowage.

(8) Such additional information of any nature that may be required by the department.

31.06 Hearing. (1) Upon receipt of an application for a permit the department shall fix a time, not more than 8 weeks thereafter, and a convenient place, for a public hearing thereon. It shall give notice of such time and place to the applicant who shall cause the same to be published in each county in which riparian lands will be affected by the proposed dam as a class 3 notice, under ch. 985. The department shall also give notice of such time and place to the county clerk of the county in which the proposed dam and flowage created thereby are located.

(2) In addition to such publication the applicant, not less than 20 days prior to such hearing, shall mail to every person interested in any lands that will be affected by the proposed dam and whose post-office address can by due diligence be ascertained, notice of the time and place set for such hearing. This notice shall be accompanied by a general statement of the nature of the application and shall be forwarded to such persons by registered mail in a sealed and postpaid envelope properly addressed. Proof of such publication and notice shall be filed with the department.

(3) At such hearing or any adjournment thereof the department shall consider the application, and shall take evidence offered by the applicant and other persons in sup-

port thereof or in opposition thereto, may require the amendment of the application, and if it appears that the construction, operation or maintenance of the proposed dam is in the public interest, considering ecological, aesthetic, economic and recreational values, the department shall so find and grant a permit to the applicant, provided the department also finds that the applicant has complied with s. 31.14 (2) and (3) and, where applicable, with s. 31.05 (3), based on the department's own estimate of the area of the flowage. The enjoyment of natural scenic beauty and environmental quality are declared to be public rights to be considered along with other public rights and the economic need of electric power for the full development of agricultural and industrial activity and other useful purposes in the area to be served. In considering public rights to the recreational use and natural scenic beauty of the river, the department shall investigate the potentialities of the lake and lake shore created by the flowage and shall weigh the recreational use and scenic beauty thereof against the known recreational use and scenic beauty of the river in its natural state, and the department shall further weigh the known recreational use and scenic beauty of the particular section of river involved against the known recreational use and scenic beauty of other sections of the same river and other rivers in the area remaining in their natural state (without regard to plans of other dams subsequently filed or to be filed); if it appears that the river in its natural state offers greater recreational facilities and scenic value for a larger number of people than can by proper control of the flowage level be obtained from the use of the lake and lake shore and that the remaining sections of the river and other rivers in the area in their natural state provide an insufficient amount of recreational facilities and scenic

beauty, and if it further appears that the economic need of electric power is less than the value of the recreational and scenic beauty advantages of such river in its natural state, the department shall so find and the permit be denied. If the department finds that approval of the permit will cause environmental pollution, as defined in s. 144.30 (9), the permit shall be denied.

(4) Not more than 20 days after receiving notice as provided in sub. (1) each county clerk may and upon request of the chairman of the county board shall give written notice as provided in s. 59.04(2) of a special meeting of the county board to be held at a time and place set by the county clerk, not less than 2 weeks nor more than 3 weeks after mailing of such notice, for the purpose of making findings as hereinafter provided. He shall give notice of the time, place and purpose of such special meeting to the department and to the applicant, who shall cause the same to be published in the county, as a class 2 notice, under ch. 985, and the applicant shall cause a copy thereof to be mailed at least 7 days prior to such special meeting to every person interested in any lands that will be affected by the proposed dam and whose post-office address can by due diligence be ascertained. Proof of such publication and notice shall be filed with the county clerk. At such special meeting the county board shall hear evidence offered by the applicant and other persons and shall find and determine by a majority vote of the county board members-elect whether the lake and lake shore created by the flowage or the river in its natural state offers greater recreational facilities and scenic beauty value for the larger number of people. The county clerk shall forthwith certify such finding and determination to the department. The jurisdiction and findings of each county board shall apply to that part of the proposed dam and flowage which is within the county.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-760 and 73-772

HENRY L. TOMOW, SR., *et al.*, *Petitioners*,

v.

MENOMINEE ENTERPRISES, INC., *et al.*, *Respondents*.

DALY, and others, *Petitioners*,

v.

NATURAL RESOURCES BOARD, *Respondent*.

On Petitions for Writs of Certiorari to the Supreme Court of the State of Wisconsin

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

The National Congress of American Indians, the National Tribal Chairmen's Association, and the University of New Mexico American Indian Law Center respectfully move for leave to file the attached brief amici curiae in these cases. The consent of the at-

torneys representing both sets of petitioners has been obtained. The consent of the attorneys for the Department of Natural Resources of the State of Wisconsin (respondent in *Daly* v. *Natural Resources Board*) has been obtained. The consent of the attorneys for N. E. Isaacson and Associates, Inc. (respondent in *Tomow* v. *Menominee Enterprises, Inc.*) has been requested but refused.

The interest of the National Congress of American Indians ("NCAI") arises from the fact that NCAI is a non-profit association of some 147 Indian tribes, whose purpose is to promote the interests of American Indians. NCAI is deeply concerned with the decisions of the Wisconsin Supreme Court because they represent two more examples of non-Indian interests usurping control of Indian lands and denying Indian treaty rights despite express Federal guarantees.

The National Tribal Chairmen's Association ("NTCA") is a non-profit organization of all duly-constituted chairmen, presidents, governors and chiefs of federally-recognized Indian tribes, and the presidents of the twelve Alaska regional corporations created by the Alaskan Natives Claims Settlement Act. NTCA joins as an amicus curiae because one of the purposes of NTCA, as expressed in its constitution, is to assure that treaty rights and federal privileges for the protection of the natural resources of Indian lands are fully enforced.

The University of New Mexico American Indian Law Center is an institute providing legal research and technical assistance on matters respecting Indian resources and treaty rights. The Law Center joins as an amicus curiae, believing that the retention of treaty rights by the Menominee Indians at their

termination requires that, on judicial review, a court must apply Indian law principles in order properly to interpret a provision of the Menominee Termination Plan restricting the alienation of Indian land.

The decision below of the Wisconsin Supreme Court rests upon an interpretation of the Menominee Termination Plan which ignores Federal treaties as well as long-standing congressional policies restricting non-Indians from taking Indian lands. Accordingly, the decisions establish a standard of review which would result in the impairment of Indian rights not only for the terminated Menominee and other terminated tribes, but also for federally-recognized tribes throughout the land. Amici seek to file the attached brief to advise the Court of the impact of the decisions below on Federal Indian law generally and on the many tribes, other than the Menominee, who will be adversely affected by those decisions.

Respectfully submitted,

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November, 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-760 and 73-772

HENRY L. TOMOW, SR., *et al.*, *Petitioners*,

v.

MENOMINEE ENTERPRISES, INC., *et al.*, *Respondents*.

DALY, and others, *Petitioners*,

v.

NATURAL RESOURCES BOARD, *Respondent*.

On Petitions for Writs of Certiorari to the Supreme Court of the State of Wisconsin

---

BRIEF OF NATIONAL CONGRESS OF AMERICAN INDIANS, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION, UNIVERSITY OF NEW MEXICO AMERICAN INDIAN LAW CENTER, AS AMICI CURIAE IN SUPPORT OF THE PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

INTERESTS OF AMICI CURIAE

The interests of the three amici curiae are set forth in the accompanying Motion for Leave to File Brief Amici Curiae.

STATEMENT OF THE CASES

Amici hereby adopt the statements as set forth in the two petitions.

REASONS FOR ALLOWING THE WRITS

Introduction

The basic question in these companion petitions is whether the Menominee Termination Plan reserves to tribal members the right to approve sales of tribal lands to non-Indians. Article XII of the Menominee Enterprises, Inc. ("MEI") articles of incorporation, which were part of the Termination Plan provided for in the Termination Act and approved by the Secretary of Interior, prohibits such land sales unless "authorized by the affirmative vote of the holders of not less than two-thirds of the outstanding shares of stock . . . ." The petitioners contend, and the trial court agreed, that "holders of the shares" means the Menominee tribal members themselves, who hold certificates representing MEI shares of stock; this meaning, they contend, is apparent when the language of article XII is read in the context of the rest of the Termination Plan and when the intent of Congress, the Secretary, and the tribal members themselves is considered. The Wisconsin Supreme Court disagreed, holding that all shares are "held" by a voting trust and that the voting trust could, acting without the approval of the tribal members, transfer ancestral tribal land to non-Indians. The court below found it

unnecessary to construe the relevant language in favor of the Tribe or to analyze the intent of Congress, of the Secretary of the Interior, or of the Tribe.

We do not plan here to discuss the facts and legal principles which have been admirably presented in both petitions. We will, however, offer the judgment of amici as to the manner in which the two opinions below emasculate essential legal principles which apply to, and protect, all American Indian tribes and their members. Ultimately, as will be seen, the Wisconsin Supreme Court simply ignored Federal Indian law and congressional intent in these cases; much to the contrary, both cases demand that the starting point be basic Indian law principles. A more specific discussion follows.

This Court Should Issue a Writ of Certiorari To Correct the Wisconsin Supreme Court's Failures (1) To Apply Applicable Federal Indian Law Doctrines, (2) To Recognize Important Menominee Treaty Rights, and (3) To Review the Termination Plan in Light of the Expressed Intent of Congress, of the Secretary of the Interior, and of the Menominee Tribe.

Before termination, the Federal Government had the duty and power to manage the Menominee tribal land for the benefit of the Tribe. *See, e.g., Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937). This duty arose, in regard to the "Menominee", from the Wolf River Treaty of 1854, where the "Menominee" were guaranteed that their ancestral land would be "held as Indian lands are held."[1] Such treaty rights

[1] This Court implied the existence of hunting and fishing rights from the language of the Menominee Treaty establishing the reservation "for a home, to be held as Indian lands are held" by looking to the surrounding circumstances of the treaty, by construing the treaty as the Indian people would have understood it and by comparing the provisions of other treaties. *Menominee*

have historically been protected by the government. Thus, this Court has recognized that "in carrying out its treaty obligations with the Indian tribes the Government . . . has charged itself with moral obligations of the highest responsibility and trust." *Seminole Nation* v. *United States,* 316 U.S. 286, 296-297 (1942).[2] Furthermore, in determining the scope of the treaty rights to be protected, the rights must be analyzed in terms of what was intended and understood by the Indian tribes themselves. *See, e.g., Seufert Brothers* v. *United States,* 249 U.S. 194, 198 (1919); *Tulee* v. *Washington,* 315 U.S. 681, 684-685 (1942).

In fulfilling its duty to protect Indian trust lands, Congress has imposed many restrictions on the alienation of tribal land. The Indian Non-Intercourse Act includes several provisions explicitly protecting Indian lands from acts of non-Indians and expressly makes invalid any conveyance of land from any Indian nation or tribe unless approved by congressional treaty or convention. *See* 25 U.S.C. § 177. Lands

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Tribe v. *United States,* 391 U.S. 404, 405 (1968). A similar analysis here demonstrates that the Menominee Indians reserved in the Wolf River Treaty the right to occupy and protect Indian lands from unlawful taking by non-Menominee. Indeed, this Court has ruled that for all practical purposes, a tribe receiving by treaty unrestricted possession of lands, effectively owns the lands so reserved. *United States* v. *Shoshone Tribe of Indians,* 304 U.S. 111 (1938). *See also, United States* v. *Santa Fe Pacific Railroad Co.,* 314 U.S. 339 (1941), where this Court described Indian possession of Indian lands to be "as sacred as the fee simple of whites" [314 U.S. at 345], and hence protected from unconsented taking.

[2] This Court has repeatedly recognized the federally-secured right of Indian lands to be free of unauthorized occupancy by third parties. *See, e.g., Shoshone Tribe* v. *United States,* 299 U.S. 476, 497-498 (1937); and *Buttz* v. *Northern Pacific Railroad Co.,* 119 U.S. 55 (1886).

granted to tribes by Executive Order cannot be transferred without a specific Act of Congress. *See* 25 U.S.C. § 398d. Tribes subject to the Indian Reorganization Act, as were the Menominee, are permitted to prevent the sale of tribal lands without the consent of the tribe. *See* 25 U.S.C. § 476. For other restrictions on the use of Indian land, *see, e.g.,* 25 U.S.C. §§348, 391, 392, and 393. In addition, Indian treaties have expressly prohibited access to, as well as ownership of, Indian lands by non-tribal members;[3] many later treaties included requirements for tribal consent to subsequent cessions of Indian lands.[4] Congress has imposed numerous other restrictions in furtherance of its trust duty, but there is no need to enumerate them here; the important point is that restrictions on the alienability of Indian land to non-Indians have always been a keystone of Federal Indian policy.[5]

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[3] Treaty of May 24, 1834 between United States and Chickasaw; 7 Stat. 450; Treaty of March 6, 1861 between United States and Sacs, 12 Stat. 1171; Treaty of July 2, 1791 between United States and the Cherokee Nation, 7 Stat. 39.

[4] For example, the Treaty of October 28, 1867 between the United States and the Cheyenne and Arapaho Tribes reserved to the tribes the right to refuse any cession of the reservation unless three-fourths of the adult male Indians occupying the lands consented. 15 Stat. 593. Similar treaty provisions requiring the specific consent of three-quarters of the tribal members for the disposition of tribal lands are included in the Treaty of March 2, 1886, between the United States and the Ute Indians, 15 Stat. 619, and in the Treaty of April 29, 1868, between the United States and the Sioux, 15 Stat. 635.

[5] The leading authority on Indian law has recognized that "the control by Congress of tribal lands has been one of the most fundamental expressions, if not the major expression, of the constitutional powers of Congress over Indian Affairs . . . ." COHEN, FEDERAL INDIAN LAW 94 (U.N. Mex. 1971 Ed.).

The above, then, was the nature of the trust responsibility to the Menominee before termination. The next question is the extent to which that status may have been altered by termination.

The Menominee people still exist as a tribe. *See., e.g., Menominee Tribe of Indians* v. *United States,* 388 F.2d 998, 1000-1001 (Ct. Cl. 1967), and the authorities cited there.[6] Treaty rights of the Menominee tribal members remain intact unless specifically abrogated by Congress. *Menominee Tribe* v. *United States, supra.* In addition, and importantly, Congress continues to have a "continued partial guardianship"—*exercised by means of the very termination plan squarely at issue here*—over the affairs of the Menominee Tribe. *See Otradovec* v. *First Wisconsin Trust,* 454 F.2d 1258, 1261 (7th Cir. 1972), where the Court held that the Menominee Termination Plan validly imposed restrictions on individual Menominee concerning the transfer of personal property. The Menominee termination was not limited to restrictions on individual Menominee; tribal real property and interests in the tribal corporation were also restricted by the Act itself.[7] Although not speaking in the con-

[6] This Court, of course, affirmed the Court of Claims decision in *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968). The Supreme Court opinion in no way cast doubt upon the Court of Claims' reasoning as to the continued existence of the Menominee Tribe; in fact, the detailed statutory analysis by the Court of Claims is virtually unimpeachable. *See also Reed* v. *United States National Bank of Portland,* 213 F.Supp. 919, 922 (D. Ore. 1963), holding that members of the terminated Klamath Tribe remained tribal members until they affirmatively chose to withdraw.

[7] 25 U.S.C. § 896 provides that the termination plan shall provide for "future control of the tribal property" and that "the plan shall contain provision for protection of the forest on a sustained yield basis for the protection of the water, soil, fish

text of termination, this Court has also recognized Congress' right to impose restrictions on Indians after emancipation from Federal control:

> "It rests with Congress to determine the time and extent of emancipation . . . . Congress may relieve the Indians from such guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property, or give to them a partial emancipation . . . ." *United States* v. *Waller*, 243 U.S. 452, 459-460 (1917).

The ultimate question in these cases, then, is how Congress intended to protect against loss of tribal land. We know that the Termination Act, and the importance supplemental plan which is most directly involved here, were basically a congressional redefinition of the Menominee tribal rights, with close cooperation from the Tribe itself and from the Secretary of the Interior. We also know that Congress has always given its most careful consideration to the question of alienation of Indian lands. Accordingly, we think that the guiding test for this Court should be the following statement from *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 345 (1941):

> " 'Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian rights of occupancy, *which could only*

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and wildlife." 25 U.S.C. § 893 requires that interests in MEI "shall be alienable only in accordance with such regulations as may be adopted by the tribe." Congress was careful to assure that these protections continued for the benefit of the Tribe by requiring the Secretary of the Interior, acting in his capacity as trustee of the Menominee lands, to approve the termination plan only if he found that the plan adequately protected the interests of the Menominee tribal members and that the plan complied with Federal law. 25 U.S.C. § 896.

be interferred with or determined by the United States.'" (emphasis supplied)

The above analysis points out the crucial error made by the court below: in neither case did the court make any effort whatsoever to analyze what was "determined by the United States," by the Tribe, or by the Secretary of the Interior in regard to the nature of Menominee tribal land holdings after termination. In neither case did the court liberally construe the relevant provisions in favor of the Tribe. *See, e.g., Choate* v. *Trapp,* 224 U.S. 665 (1912). Rather, the Wisconsin Supreme Court simply analyzed—virtually in a vacuum—a single phrase in the MEI corporate articles of incorporation.

We will not here advise the Court in detail as to what was intended by Congress, by the Tribe, or by the Secretary of the Interior—the important point is that the court below simply failed to analyze such intent at all. In general, however, we are confident that the legislative history involved here, as well as the intent of the Tribe and the Secretary, will indeed show that one of the basic objects of all concerned parties was to avoid a "land grab" of Menominee land by non-Indians. 99 CONG. REC. 9746 (Aug. 24, 1953). Unfortunately, the court below treated these cases in a narrow, corporate context without recognizing that these cases involve Indian lands, Indian treaty rights, and the intent of Congress in regard to those rights. The result, of course, was approval by the Wisconsin Supreme Court of the transfer to non-Indians of ancestral Menominee land by just seven people, three of whom were non-Menominee.

The principles involved here touch upon basic rights of all Indian tribes. It is important that this Court

clarify the standards of judicial review when courts deal with the unique rights in land held by Indian tribes pursuant to Indian treaty. Time and time again, this Court has found it necessary to review the decisions of lower courts which have infringed upon Indian rights by failing to give adequate consideration to applicable Indian treaties, statutes, and congressional policies concerning Indians. For example, in four recent Indian law cases cited by this Court, certiorari was granted to review decisions of state appellate courts where the state courts' standards of review precluded the consideration of those Federal rights unique to Indian people. *See Mattz* v. *Arnett,*——— US———, 37 L.Ed. 2d 92 (1973); *McClanahan* v. *State Tax Commission,*———US———, 36 L.Ed.2d 129 (1973); *Poafpybitty* v. *Skelly Oil Co.,* 390 U.S. 365 (1968); and *Williams* v. *Lee,* 358 U.S. 217 (1959). Thus, this Court has repeatedly held that, because Federal Indian rights set Indian people apart from ordinary citizens, judicial review of matters affecting Indians must account for such rights:

> "We agree . . . that Indians are citizens and that in ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax law should be clearly expressed. *But we cannot agree that taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act.*" (emphasis supplied) *Squire* v. *Capoeman,* 351 U.S. 1, 6 (1956).

CONCLUSION

In the final analysis, standards of judicial review constitute the last barriers against the loss of Indian treaty rights and against the diminution of tribal land

bases. Beginning as long ago as Chief Justice Marshall's opinion in *Cherokee Nation* v. *Georgia,* 30 U.S. 1 (1831), this Court has sifted through almost countless treaties, statutes, and Executive Orders—many of which were broken or simply ignored—and has arrived at specific standards of judicial review which apply to the unique field of Federal Indian law.

Here, rather than following such well-established principles, the Wisconsin Supreme Court applied straight corporate law to a land transaction which threatens to cost the Menominee Tribe its ancestral heartland. Such an approach is wholly unwarranted in these cases which involve the direct products of termination, now repudiated by Congress, but once the central Federal Indian policy for the better part of two decades. In a word, these are Federal Indian law cases, not state corporate law cases.

Amici urge this Court once again to exercise the vigilance it has so often shown in protecting Indian rights and to grant certiorari to review the decisions of the Wisconsin Supreme Court.

Respectfully submitted,

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November, 1973

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-772

DALY AND OTHERS,
Petitioners,

v.

NATURAL RESOURCES BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF RESPONDENT IN OPPOSITION

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December 5, 1973

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-772

DALY AND OTHERS,
Petitioners,

v.

NATURAL RESOURCES BOARD,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF OF RESPONDENT IN OPPOSITION

JURISDICTION

The petition herein erroneously asserts that this Court has jurisdiction under 28 U.S.C. §1257 (3). There is no jurisdiction in this Court to review the judgment of the Wisconsin Supreme Court because the questions presented in the petition were neither raised in nor decided by the Wisconsin Supreme Court and, further, the only questions raised by the petitioners in the Wisconsin Supreme Court and decided by it were exclusively questions of state law.

STATEMENT OF THE CASE

On March 11, 1969, and under the provisions of sec. 31.05, Wis. Stats., Lakes of the Menominees, a copartnership or joint venture, filed an application with the Wisconsin Department of Natural Resources for a permit to construct, operate, and maintain a dam in the Linzy Creek outlet of Pywaosit Lake in Menominee County, Wisconsin (App. 2, 18, 54).

After notice, a hearing was held on the application before hearing examiners of the Wisconsin Department of Natural Resources (App. 2, 19, 54-59). At the hearing several persons appeared, were heard, and were recorded as being in favor of the granting of the application, and a great number appeared or were represented and were recorded as being in opposition to the granting of the application (App. 2, 19, 54-59). The petitioners herein, who are enrolled members of the Menominee Tribe of American Indians, appeared at the hearing in opposition to the granting of the permit (App. 19).

On September 14, 1970, the Department of Natural Resources issued the permit to construct the dam (App. 2, 18, 64).

The petitioners thereafter filed a petition for judicial review under ch. 227, Wis. Stats., in the Circuit Court of Dane County, Wisconsin (App. 1, 19). The Dane County Circuit Court affirmed the order granting the dam permit in question (App. 1, 52, 53). Its memorandum opinion is Appendix B to this petition (App. 18-51). The circuit court rejected the petitioners' claims in respect to the here involved dam permit and decided that the administrative hearing was not a "contested case" within the meaning of

sec. 227.01, Wis. Stats. (App. 23); that even if it was a "contested case" the due process "fair-play" provisions of ch. 227, Wis. Stats., had been met (App. 23, 24); that the notice provisions of sec. 31.06 (2), Wis. Stats., had been complied with (App. 24); and that the findings of fact and order of the Department of Natural Resources were supported by "substantial evidence in view of the record as a whole." (App. 24-50).

The petitioners, then, appealed to the Wisconsin Supreme Court from the judgment of the Dane County Circuit Court (App. 1).

Contrary to the assertions contained in the petitioners' "Statement of the Case" herein, no federal question or questions were raised by the petitioners in the Wisconsin Supreme Court. The *only* questions raised by them in the Wisconsin Supreme Court were questions of state law. These questions were described by that court as follows:

> "The appellants contend (1) that the proceeding before the DNR was a contested case [within the definition of sec. 227.01, Stats.] and not a legislative hearing, (2) that due process 'fair-play' requirements of ch. 227, Stats., for a contested case were not complied with, (3) that the notice requirements of sec. 31.06 (2) were not complied with, and (4) that findings of fact of the DNR were not supported by 'substantial evidence in view of the record as a whole.' " (App. 3.)*

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*This description of the questions is an accurate one. The "Questions Involved" as set forth in the petitioners' brief to the Wisconsin Supreme Court are stated by them to be:

"1. Was this a 'contested case' within the definition contained in Sec. 227.01 (2), Wisconsin Statutes?"

"2. Assuming that this was a 'contested case,' were the Chapter 227, Wisconsin Statutes, due process standards met?"

"3. Was the independent statutory due process requirement of individual notice, which is set forth in Sec. 31.06 (2), Wisconsin Statutes, met?"

"4. Were the findings of fact and order of the DNR supported by 'substantial evidence in view of the record as a whole?' "

The Wisconsin Supreme Court, which affirmed the judgment of the circuit court, decided only the above questions of state law and did *not* decide any federal question, including those set forth in this petition as the "Questions Presented" (App. 1-17).

ARGUMENT

This Court Has No Jurisdiction To Review The Judgment Of The Wisconsin Supreme Court Herein.

A. The questions presented in this petition were neither raised in nor decided by the Wisconsin Supreme Court.

The jurisdiction of this Court to review on certiorari the final judgments or decrees of state courts is set forth in 28 U.S.C. §1257 (3). Such jurisdiction exists *only* when a federal question has been presented to and decided by the highest court of the state and its decision of the federal question was necessary in its determination of the cause. In *Durley v. Mayo* (1956), 351 U.S. 277, 281, 76 S.Ct. 806, 100 L.Ed. 1178, 1183, this Court wrote:

> " 'It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v Hanan, 300 US 14, 18; Lynch v New York, 293 US 52. * * *' "

A more recent case in which a writ of certiorari was dismissed for want of jurisdiction because of a failure to

raise the federal question in the highest state court is *Cardinale v. Louisiana* (1969), 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed. 2d 398. This Court, in dismissing the writ, wrote (394 U.S. 437, 438):

> "Although certiorari was granted to consider this question [admissibility of a confession], the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. *It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.* In Crowell v Randell, 10 Pet 368, 9 L Ed 458 (1836), Justice Story reviewed the earlier cases commencing with Owings v Norwood's Lessee, 5 Cranch 344, 3 L Ed 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c 20, §25, 1 Stat 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet 368, 391, 9 L Ed 458, 467. *The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion,* Miller v Nicholls, 4 Wheat 311, 315, 4 L Ed 578, 579 (1819), *and since,* e.g. Safeway Stores, Inc. v Oklahoma Retail Grocers Assn., Inc., 360 US 334, 342, n. 7, 3 L Ed 2d 1280, 1286, 79 S Ct 1196 (1959); State Farm Mutual Automobile Ins. Co. v Duel, 324 US 154, 160-163, 89 L Ed 812, 817-819, 65 S Ct 573 (1945); McGoldrick v Compagnie Generale Transatlantique, 309 US 430, 434-435, 84 L Ed 849, 851-852, 60 S Ct 670 (1940); Whitney v California, 274 US 357, 362-363, 71 L Ed 1095, 1100-1101, 47 S Ct 641 (1927); Dewey v Des Moines, 173 US 193, 197-201, 43 L Ed 665, 667-668, 19 S Ct 379 (1899); Murdock v City of Memphis, 20 Wall 590, 22 L Ed 429 (1875)." (Emphasis added.)

See also the still more recent cases of *Hill v. California* (1971), 401 U.S. 797, 805, 806, 91 S.Ct. 1106, 28 L.Ed. 2d 484, 490, 491; *Monks v. New Jersey* (1970), 398 U.S. 71, 90 S.Ct. 1563, 26 L.Ed. 2d 54; and *DeBacker v. Brainard* (1969), 396 U.S. 28, 90 S.Ct. 163, 24 L.Ed. 2d 148.

As revealed by the opinion of the Wisconsin Supreme Court herein, 60 Wis. 2d 208, 208 N.W. 2d 839, and Appendix A to this petition, neither of the questions presented by this petition was raised in nor decided by the Wisconsin Supreme Court.

B. The only questions raised by the petitioners in and decided by the Wisconsin Supreme Court were questions of state law, which this court has no jurisdiction to review.

The questions presented by the petitioners to the Wisconsin Supreme Court and decided by it in *Daly and others v. Natural Resources Board* (1973), 60 Wis. 2d 208, 208 N.W. 2d 839, were exclusively questions of state law. As set forth by that court:

> "The appellants contend (1) that the proceeding before the DNR was a contested case and not a legislative hearing, (2) that due process 'fair-play' requirements of ch. 227, Stats., for a contested case were not complied with, (3) that the notice requirements of sec. 31.06 (2) were not complied with, and (4) that findings of fact of the DNR were not supported by 'substantial evidence in view of the record as a whole.' " (App. 3 or 60 Wis. 2d at 212.)

The Wisconsin Supreme Court decided that the administrative proceeding was a "contested case" within the meaning of ch. 227, Wis. Stats. (App. 10); that the due process

"fair-play" requirements of ch. 227, Wis. Stats., did apply and had been complied with therein (App. 10); that the notice requirements of sec. 31.06 (2), Wis. Stats., had been met (App. 10, 11), and that the findings of fact of the Department of Natural Resources were supported by "substantial evidence in view of the record as a whole" (App. 12-17). Absolutely no federal question was raised in or decided by the Wisconsin Supreme Court in this case.

Questions of state law are not reviewable by this Court on a petition for certiorari to review a judgment of the highest court of a state. This fact was pointed out by Justice Brandeis in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill* (1930), 281 U.S. 673, 680, 50 S.Ct. 451, 74 L.Ed. 1107, wherein he wrote:

> "It is true that *the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state;* that *this court's power to review decisions of state courts is limited to their decisions on federal questions;* and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court." (Emphasis added.)

See also *Henry v. Mississippi* (1965), 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed. 2d 408; *Herb v. Pitcairn* (1945), 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789; *United Gas Public Service Co. v. Texas* (1938), 303 U.S. 123, 58 S.Ct. 483, 82 L.Ed. 702, and many others.

CONCLUSION

For the above reasons this Court has no jurisdiction to review the judgment of the Wisconsin Supreme Court herein and the petition for certiorari must be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

DALY AND OTHERS,

Petitioners,

vs.

NATURAL RESOURCES BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Wisconsin

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REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION

In its response to the petition for certiorari, the respondent has asserted that the questions presented in the petition were neither raised in nor decided by the Wisconsin Supreme Court, and, that the only questions raised by the petitioners in the Wisconsin Supreme Court and decided by it were exclusively questions of state law.

Petitioners assert, however, that the federal questions presented in the petition were clearly raised and decided by the Wisconsin Supreme Court.

After noting the historical background of the instant case and the *Tomow*[1] case,[2] the Wisconsin Supreme Court discussed the nature of the dam application[3] and stated that:

> Those opposing the application for the permit challenged the ownership of the land affected (this issue has been resolved by *Tomow,* supra), its effect on other waters and riparian lands, its economic feasibility, its effect upon tribal hunting and fishing rights (citing "*Menominee Tribe* v. *United States,* (1968), 391 U.S. 404, 88 Sup. Ct. 1705, 20 L. Ed. 2d 697.) and its effect upon esthetic and ecological values.[4]

That Court also noted that although the petitioners are enrolled Menominee tribal members, they merely had the same rights in the issues presented by the case as any state citizen interested in protecting his public right to enjoy navigable streams for recreational purposes. However, it also noted that:

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[1] See petition for certiorari: Tomow v. MEI et al and N.E. Isaacson, No. 73-760.

[2] See Wisconsin Supreme Court decision in this case, Pet. App. p. 3-4.

[3] See Wisconsin Supreme Court decision in this case, Pet. App. pp. 5-7.

[4] See Wisconsin Supreme Court decision in this case, Pet. App. p. 7.

> As enrolled members of the Menominee Tribe they had an additional indirect right in the preservation of their hunting and fishing privileges. [5]

The Wisconsin Supreme Court also stated that:

> There is a contention that the notice provisions of Sec. 31.06, Stats., have not been complied with in that personal service of notice or notice by mail was not given to them or any of the 3,270 enrolled Menominees. In *Tomow, supra,* it was determined that title to land and the right to manage it and sell it was in MEI and the voting trust. The individually enrolled Menominees therefore did not have sufficient personal interest so as to entitle them to personal notice. Notice was published in the newspaper most likely to be seen by the residents of Menominee County. Without question, they did have actual notice, they did appear, and did participate. [6]

Thus, the Wisconsin Supreme Court clearly had before it the two issues which are the subjects of the federal questions raised in this petition: A. the petitioners' claim that the conveyance of tribal lands to Lakes of the Menominees violated their rights under federal law, and, therefore, that Court's ground of several findings essential to the granting of the permit solely on its findings as to those rights in the *Tomow* case also renders its decision here violative of petitioners' rights under federal law, and; B. the petitioners' claim that their treaty hunting and fishing rights were illegally abrogated and impaired by the respondent's order granting the dam construction permit.

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[5] See Wisconsin Supreme Court decision in this case, Pet. App. p. 10.

[6] See Wisconsin Supreme Court decision in this case, Pet. App. pp. 10-11.

A. The Legality of the Conveyance.

The Wisconsin Supreme Court's holding in this case regarding the ability of MEI to convey the lands affected by the dam to LOM rests entirely upon its findings in *Tomow* that petitioners and their fellow tribal members had no rights under the Menominee Termination Act and Plan to control conveyances of tribal lands to non-Menominee after Termination became effective in 1961.[7] In *Tomow*, that Court decided that 7 voting trustees and not the enrolled Menominee tribal members had the power under the Termination Act and Plan to approve such conveyances. In the instant case, that Court relied solely on that holding and held that the ownership statement required by § 31.05 (3), Wis. Statutes,[8] was properly met by the fact that MEI, with the approval of the voting trustees alone, had stated in the application that it was the owner of the land affected by the dam and that it could convey such land to the LOM joint venture.

The Wisconsin Supreme Court's holding as to the notice requirements of 31.06(2), Wisconsin Statutes, is also based solely on its finding in *Tomow* that the petitioners and their fellow tribal members did not retain any rights to approve conveyances of tribal lands to non-Menominee.[9] It is petitioners' position in the instant case, that the grounding by the Wisconsin Supreme Court of these two essential findings solely on that Court's erroneous holding in *Tomow*

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[7] See quotations, supra, and that Court's decision in Pet. App., pp. 7 and 10-11.

[8] § 31.05(2) is reproduced in Pet. App., p. 68.

[9] See quotations, supra, and that Court's decision in Pet. App., pp. 10-11.

regarding the petitioners rights concerning conveyances to non-Menominee, completely bypasses and negates petitioners rights under federal law, the Menominee Termination Act and Plan. If this Court grants a writ of certiorari in the *Tomow* case, see companion petition, No. 73-760, and reverses the Wisconsin Supreme Court as to the approval of land sales issue, the decision of that Court in the instant case which is so inextricably and necessarily intertwined with the holdings on the federal questions in the *Tomow* case, must also be overturned. It is for this reason that petitioners respectfully request this Court to grant certiorari on this issue.

B. Treaty Hunting and Fishing Rights.

In holding that the petitioners as enrolled members of the Menominee Tribe . . . had an additional indirect right in the preservation of their hunting and fishing privileges,[10] the Wisconsin Supreme Court cited *Menominee Tribe of Indians* v. *U.S.*, 391 U.S. 404 (1968), wherein this Court reaffirmed the fact that only Congress may abrogate treaty rights and held that the Menominee Termination Act had not abrogated petitioners' rights to hunt and fish which were guaranteed them in the 1854 Treaty of Wolf River.[11] However, in reviewing the Circuit Court's opinion that this Treaty did not prevent the respondent from approving the transfer of the land to LOM and its flooding of the land, the Wisconsin Supreme Court chose to ignore these treaty rights, and, hence, abrogated them as to the tribal lands affected by the dam and its flowage. Its deci-

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[10] See quotation, supra, and that Court's decision in Pet. App. p. 10.

[11] Menominee Tribe of Indians v. U.S., 391 U.S. 404 (1968).

sion also impaired petitioners' treaty rights in the remainder of their tribal lands in that the swampy lands which are affected by the dam constituted an historically essential breeding grounds for game and fish populating the entire reservation. As noted in the petition, the swampy nature of the land was a primary reason for the tribe's selection of the land for its reservation in 1854. [12]

In summary, the Wisconsin Supreme Court's decision in the instant case bestowed upon the 7 voting trustees the right to alter the ecology essential to the petitioners and their fellow tribal members exercise of their treaty-protected hunting and fishing rights. That Court's decision also bestowed upon the same voting trustees the right to convey tribal lands subject to these treaty rights to non-Menominee without the approval of the tribal members. That Court's decision, accordingly, completely negates the rights which petitioners and their fellow tribal members reserved to themselves in the Termination Plan and which this Court found were preserved in the Termination Act.

The Wisconsin Supreme Court's decision in this case presents petitioners with an anomaly. It recognized petitioners' treaty rights in the affected lands, but in approving the issuance of the permit by the respondents it prohibited the petitioners and their fellow tribal members from exercising those rights on the flooded lands and impaired their exercise of the rights on surrounding lands. Its decision also denied petitioners any right to notice that their treaty rights to hunt and fish these lands might be abolished by action of a state agency. The Wisconsin Supreme Court's conclusion that the 7 voting trustees could sell or so change

[12] See discussion in petition, pp. 11, 14, 15, 17, 18 and 19.

the ecology of all the tribal lands as to abrogate treaty hunting and fishing rights, is completely incompatible with petitioners' rights under the 1854 Treaty of Wolf River and the Menominee Termination Act and Plan as to clearly confer jurisdiction upon this Court to consider the questions presented by this case.

Conclusion

For all of the above reasons, and those cited in this brief based on the petitioners for certiorari in this and the *Tomow* case, petitioners respectfully assert that this Court clearly possesses jurisdiction under Title 28, U.S.C., § 1257 (3) to review this case.

Respectfully submitted,

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